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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1963

No. 879

NORMAN MAYER,

Petitioner,

vs.

ILLINOIS NORTHERN RAILWAY,
a corporation,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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Your Petitioner, Norman Mayer, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause.

OPINIONS BELOW.

The opinion of the Court of Appeals, which is reprinted in full as Appendix II to this petition, is reported at 324 F. 2d 154. The United States District Court for the Northern District of Illinois, Eastern Division, whose judgment was affirmed by the Court of Appeals, wrote no opinion.

JURISDICTION.

The Date Of Judgment Sought To Be Reviewed.

The judgment of the Court of Appeals was entered October 10, 1963, (Appendix II, infra p. 60a,) and became final on November 13, 1963, when the said Court denied your petitioner's petition for rehearing. The order of denial of rehearing appears, (infra p. 59a,) as Appendix I. Upon the order of one of the Justices of this Court, entered February 7, 1964, (which appears infra as Appendix I (p. 59a,)) your Petitioner was granted an extension of time in which to file this petition to and including February 29, 1964.

The Questions Presented.

1. Can Rule 61 of the Federal Rules of Civil Procedure be employed to deny a substantive right created by the Federal Employers' Liability and Federal Safety Appliance Acts?

2. Shall a District Court be permitted through patently erroneous rulings to deprive an employee of full remedial benefits in an action wherein he has been injured by the undisputed violation of the Federal Safety Appliance Act?

3. Which of conflicting decisions at Court of Appeals level are to control the application of Rule 61 to evidence admitted or excluded in actions under the Federal Employers' Liability Act?

4. Whether a local rule of procedure may be employed in such a manner as to confuse the right to a jury trial which is a part and parcel of the remedy afforded under the Federal Employers' Liability Act?

The Statutory Provision Conferring Jurisdiction On This Court To Review The Judgment In Question By Writ Of Certiorari.

The jurisdiction of this Court is invoked under Section 1254(1), Title 28, U.S.C.A., providing for review by this Court on writ of certiorari granted of cases in courts of appeal.

THE FEDERAL STATUTES AND RULES INVOLVED.

Involved here are the Federal Safety Appliance Act (45 U.S.C.A., section 11), and in particular the order of the Interstate Commerce Commission concerning running boards on railroad cars,[1] Rule 61 of the Federal Rules of Civil Procedure, 28 U.S.C.A., Rule 61 and Rule 20[2] of the

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[1] "Running Boards:

Location: Full length of car, center of roof." Interstate Commerce Commission, U. S. Safety-Appliance Standards, Orders of the Commission, 1946, p. 3.

[2] "Rule 20. Impartial Medical Testimony.

(a) Prior to the date set for the commencement of the trial of any personal injury suit, an examination (physical, medical, psychiatric, either or all) of the injured person, together with a report thereon, by an impartial medical expert or experts may be ordered—

(1) By a judge on his own motion, or

(2) On the motion of counsel for either party after a hearing thereon, if a hearing is requested, if, in the judgment of the court such an order will be in the interest of justice and will materially aid in the just determination of the cause. The granting or withholding of such an order shall be entirely discretionary with the court. A copy of the report of examination shall be given to the court and to the attorneys for the respective parties.

Should the judge, at any time during the trial of the cause, consider it advisable, he may, in his

Civil Rules of the United States District Court, Northern District of Illinois.

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(2) *Continued*

discretion, and on his own motion, order such an examination and report.

Any examination ordered shall be made by a member or members of a panel of examining physicians designated for his or their particular qualifications by the Illinois State Medical Society after consultation with the court.

(b) At the termination of the case in this court, the trial judge shall fix the compensation of the expert or experts and, unless otherwise directed by the court, such compensation shall be taxed as costs and paid by order of court. The judge, in his discretion, may direct that the parties, or either of them, deposit with the Clerk of the Court security in a specified amount which may be used for the payment of such compensation.

(c) In the event that the case shall go to trial after such examination and report have been made, or that trial shall be resumed, then either party or the court may call the examining physician or physicians to testify, in which event additional compensation may be allowed and taxed as costs as aforesaid."

STATEMENT OF FACTS.

Petitioner, Norman Mayer, a 52 year old man who had been employed as a switchman for respondent for a period of 21 years, brought this action against respondent, Illinois Northern Railway, under the provisions of the Federal Safety Appliance Act. (R. 5, 7) During a nighttime switching operation in an unlighted yard, he fell on the top of a box car at a point where a section of the running board, or catwalk, atop the car was missing. (App. I, 16a)

The evidence that respondent violated the Safety Appliance Act (45 U.S.C.A. sec. 11) was uncontroverted. The violation had to do with the absence of running boards running the full length of the car in accord with the orders of the Interstate Commerce Commission. (See Interstate Commerce Commission, United States Safety-Appliance Standards, Orders of the Commission, 1946, p. 3.)

The Circuit Court of Appeals waived the filing of an Appendix in the cause and reviewed the case on the Record and the Transcript of Proceedings, certified copies of which have been filed in this Court. The District Court wrote no opinion in the case, and the opinion of the Circuit Court of Appeals narrates none of the background facts and but few of the operative facts with respect to the Federal questions hereto stated. To aid the Court in its understanding of the problems presented, we have printed an Appendix which is attached to the Petition for Certiorari. References will be to the Appendix, except in those instances where we might allude to the Record as "R" and the transcript itself, and in the latter instance, we shall note the folio number and page number.

Immediately after the conclusion of the switching movement, petitioner reported his fall and injury to the yardmaster and to the conductor of his switching crew. (App. I, 12a, 16a) Present when he made his report was William Jesse, another switchman in the crew. (App. I, 12a) After hearing petitioner's report, Conductor Cleveland climbed to the top of the freight car in question and ascertained that a section of the running board was missing. In like manner Jesse discovered for himself that a portion of the running board was missing. (App. I, 12a)

The following morning, respondent's general mechanical foreman, Michael McKenzie, and Fred Rieman inspected the car in the North Western yard. Both found that a portion of the metal running board or catwalk about six feet long was missing at a point about nine feet from the "A" end of the car, being the end opposite from the brake.

After such inspection, Rieman put a bad order ticket on the car and ordered it to the repair track. (T1—114)

Within half an hour petitioner was taken by respondent's yardmaster to the offices of Dr. Vachout, a company doctor, for treatment. (App. I, 16a) This doctor gave petitioner emergency treatment and 35 subsequent treatments. He never discharged petitioner, who on February 30, 1959, was taken to Dr. Arthur A. Conley, a consultant for the Railroad.

Following this, plaintiff went to a specialist in orthopedics, Dr. Leo Miller. (App. I, 17a, 24a) The following was uncontradicted: Dr. Miller first saw plaintiff on March 19, 1959, and from his examination and X-rays, diagnosed that plaintiff had an internal derangement of the knee, due to a cartilage tear. (App. I, 24a) However, because the doctor felt the findings were not sufficient for definitive

treatment, he suggested that plaintiff should try to go back to work to see if he could carry on. (App. I, 24a) This the plaintiff did on April 28 or 29, 1959, and he worked until August 28, 1959. (App. I, 17a) During this period the left knee was sore and painful, would become swollen after extensive use and was unstable, (App. I, 17a) and plaintiff treated himself with hot baths and heat application. (App. I, 17a)

On August 29, 1959, plaintiff returned to Dr. Miller who, upon finding marked effusion, a fluid produced by irritation in the knee, (App. I, 24a) hospitalized plaintiff and performed surgery. (App. I, 24a) Upon opening the knee, it was found that the medial meniscus, a cartilage formation which acted as a washer or shock absorber, was shredded and that there were areas of irritation around it. (App. I, 25a) The shredded cartilage, he said, was like sand in a motor and had the effect of roughening the bones in contact with it. (App. I, 25a)

The cartilage was removed, after which plaintiff was confined to the hospital for 13 days. He left on crutches which he continued to use for more than four months. (App. I, 17a) Plaintiff was given physiotherapy and Dr. Miller next examined him on November 13, 1959, at which time there was a recurrence of the swelling in the knee joint, which indicated the presence of fluid. (App. I, 25a) On December 11, 1959, the swelling had increased so fluid was drawn off and a cortisone product injected into the joint. Dr. Miller next saw plaintiff on February 29 and March 21, 1960, at which times there was still pain and swelling in the knee. (App. I, 25a)

Respondent obtained an order on May 8, 1961, whereby Dr. Thomas D. Hall, an orthopedic surgeon, was appointed as the Court's impartial examiner.

Dr. Hall filed with the Clerk of the Court and with both parties an extensive report, (App. I, 8a-12a) in which he concluded that "I do not believe that this patient would be able to return to an activity which is somewhat precarious and dependent upon strength and disability in the knee with the knee in its present condition. In addition I believe it unlikely that he will regain sufficient function to permit resumption of his former occupation." (App. I, 11a, 12a)

After Dr. Hall's report had been filed, respondent made another motion for reference for an impartial examination by a second orthopedic man, and the order was entered on October 27, 1961, over petitioner's objections. Petitioner's motion to vacate the order was denied. (R. 162, 163)

At the trial, Petitioner called Dr. Hall, who supported his report. (App. I, 33a-39a) Respondent called Dr. Sideman, the second impartial medical examiner, who, notwithstanding his finding of a traumatic arthritis in the joint, in response to a hypothetical question, stated that the man was able to do the type of work he did prior to the date of the injury, although he expressed unfamiliarity with the duties of a switchman. (App. I, 55a)

It is to be noted, that in addition thereto, Dr. Sideman found a wasting of the left thigh and calf, a half inch enlargement of the left knee, and pointed out, when shown films taken on March 23, 1962, that there had been an active process in the left knee between that date and January 1959, the date of the first films shown him, and that this was inconsistent with a degenerative process following an injury of this character. (App. I, 54a, 56a, 57a)

We have set forth the foregoing demonstration of severe injury petitioner sustained. At the time of the occurrence,

he was earning $128.00 a week, or $6,429.09 for the year 1958. He was away from work December 18, 1958, to April 29, 1959, or nineteen weeks, during which he lost $2,443.40. He returned to work April 29, 1959, and worked until August 28, 1959, when he entered the hospital for surgery.

The Court of Appeals, "viewing the plaintiff's damages in a light favorable to the defendant," held his liquidated damages to be $5,298.41.

As the opinion indicates, we computed his liquidated damages at $11,188.20, basing it on an additional sixty-eight week loss of $8,744.80, to December 27, 1960, which was the first time the railroad doctor stated he could return to work. (T4—29) He had not returned to work at the time of the trial on March 29, 1962, which could be a total loss of earnings of $20,208.20, or, as the Court of Appeals held, $5,298.41.

It is to be noted that in an action under the Safety Appliance Act, there is no requirement for proof of wrongdoing, as in the FELA.

Almost Every Conceivable Tactic Was Employed To Deny Petitioner Of The Remedy Contemplated By The Act.

Notwithstanding petitioner at no time had been offered any type of work by respondent after this occurrence, notwithstanding that at no time respondent found him fit for work or ordered him back to work, the District Court allowed, over petitioner's objections, J. M. Traylor, the railroad superintendent, to testify about all men hired for all positions by the railroad since the date of petitioner's injury.

Specifically, he was permitted to testify:

(a) That six men had been hired in respondent's car department since the date of the accident, the dates of the hirings being given as March 1, 1959; May 5, 1959; January 11, 1960; July 19, 1960; and July 10, 1961. (App. I, 40a, 41a)

(b) That three tower men had been hired, respectively, on October 26, 1959; March 4, 1960; and October 9, 1961. (App. I, 41a, 42a)

(c) That yard clerks, aged 19 and 27, were hired November 4, 1960 and March 21, 1961. (App. I, 43a)

(d) That firemen had been hired on June 13, 1959; June 26, 1959; August 28, 1959; February 7, 1960; and July 7, 1960. (App. I, 44a)

Traylor admitted that none of the jobs to which he had testified were offered to petitioner, (App. I, 46a,) and likewise conceded he did not know of a single instance in the 2½ year period to which he testified, wherein an injured trainman had been transferred to any of the jobs enumerated. (App. I, 50a)

When respondent objected, the court would not permit petitioner to inquire of the witness if it was not the company policy that injured trainmen would not be taken back, where the nature of the injury was such that re-injury was possible. (App. I, 49a)

To meet the inference created by Traylor's testimony, petitioner offered to prove through the testimony of Joseph O'Connor, an official of the Brotherhood of Railroad Trainmen and himself an employee of respondent, that it was the custom and practice of respondent, in the case of employees found fit to return to work after an injury, to give such employees a return-to-work slip; that if an employee

does not then return, he is taken off the roster; and that respondent had never given the petitioner a return-to-work slip. (App. I, 32a)

The trial court, however, sustained respondent's objections and excluded such evidence. (App. I, 32a)

So also, after an unfavorable report had been received by an impartial medical examiner appointed on the application of the respondent, respondent was allowed to have a second impartial medical examination.

The reasons it urged for the second impartial medical examination, namely, the doctor's reference to subjective symptoms and the possible removal of the patella, did not arise during the trial. Nevertheless, the Court allowed respondent to call on its behalf, over petitioner's objections, the doctor who made the second impartial examination. This increased the confusion respondent was creating through collateral issues.

In response to petitioner's objections that to allow a second impartial medical examiner to testify would violate the very nature of the doctrine of impartial medical examination, the District Court responded that it would be a "sort of a Mexican stand-off," a procedure which could hardly aid the administration of justice.

Respondent attacked petitioner's age, although it had known it since February 13, 1937, when he entered its employ. (App. I, 19a) Respondent persisted in showing that in 1926 and 1929, when he made work applications for the Santa Fe Railroad, petitioner gave his date of birth as 1902.

As if that were not enough, respondent persisted in its character-assault by asking petitioner whether he frequented Murphy's Tavern. It was only after a lengthy colloquy in the presence of the jury that this interrogation was foreclosed. (App. I, 21a, 22a)

The propriety of this conduct was not only questioned at the trial, but on petitioner's motion for new trial. The Court of Appeals did not undertake to defend these assignments of error, but contented itself with this statement: "Absent prejudicial error adversely affecting the substantial rights of the plaintiff—inconsistent with substantial justice—the ruling of the District Court must stand."

Obviously, an accumulation of such conduct puts one seeking a remedy under this Federal Act at a disadvantage not contemplated by Congress or simple justice.

It is clear that the Court of Appeals erred in regarding these matters as "harmless error" under Rule 61. The best proof of the error is the verdict itself.

That there were errors cannot be denied. What the effect of those errors was can hardly be ascertained through hindsight.

This case resolves itself to the proposition where a railroad who has injured an employee through its violation of the Safety Appliance Act, may, with impunity, commit error and then argue that such error was "harmless".

REASONS FOR GRANTING THE WRIT.

I.

THE DISTRICT COURT, BY PATENTLY ERRONEOUS AND PREJUDICIAL RULINGS ON EVIDENCE, HAS DEPRIVED PETITIONER OF THE SUBSTANTIVE RIGHTS AND REMEDY INTENDED FOR ONE INJURED BY AN UNDISPUTED VIOLATION OF THE SAFETY APPLIANCE ACT. — THE SAME ERROR HAS BEEN PERPETUATED IN THE COURT OF APPEALS BY SUMMARY DISPOSAL UNDER RULE 61 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

As this Court has frequently stated, the Federal Employers' Liability Act and the Federal Safety Appliance Act were enacted because of the frequency of injury to those involved in railroading. The creation of this right may be empty unless its enforcement is guarded by this Court.

We shall herein demonstrate that petitioner had a right of action, but that cause of action was diluted by matters occurring during the trial, and this, notwithstanding the absolute liabilities imposed by the Federal Safety Appliance Act. (*Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U.S. 430, 434, 435.)

From time to time this Court has been called upon to reiterate by judicial decision the remedial purposes of these Acts. Thus, notwithstanding the abolition of the doctrine of assumption of the risk by statutory enactment, (45 U.S.C.A. §54, 64) it required an opinion of this Court to obliterate every vestige of such a defense. (*Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54.) So also was conduct of a plaintiff being used to deprive him of the

right to jury trial conferred and intended by the Acts, until this Court spoke. (*Rogers* v. *Missouri Pacific R.R.*, 350 U.S. 500, 524, 529.) We believe the present case should also be a springboard to action and should elicit this Court's disapproval, not only of erroneous rulings on evidence which dilute the remedy and deny to litigants substantial justice, but also the use of Rule 61 on review as a carpet under which those errors of substance are conveniently swept.

We urge this Court's review, not only for the purpose of according petitioner substantial justice, but also for the broader purpose of securing a determination of what the rule of law is concerning prejudicial errors which attenuate the remedy intended by these Acts. It is, of course, obvious that a remedy given by a statute can be diluted or rendered meaningless by the rulings of the forum where it is pursued. What is more, as we demonstrate in a succeeding point, there appears to be inconsistency in opinions of the various circuits as to whether Rule 61 is to be applied in F.E.L.A. actions.

The orders of the Interstate Commerce Commission, enacted according to power delegated to it by the Safety Appliance Act (45 U.S.C.A., Sec. 12), require that running boards run the entire length of a car. This order of the Commerce Commission becomes part of the Safety Appliance Act. (Sec. 12)

It is undisputed that respondent violated this absolute duty in the present case. And the jury, by its verdict, has found there existed the necessary relationship between such violation and the injuries suffered by petitioner. Indeed, respondent has acquiesced in such finding for it neither sought a new trial nor appealed from the verdict

and judgment against it. Under comparable circumstances one court has remarked that such a defendant could be assumed as regarding "the verdict as a victory for defendant," (*Kinsell* v. *Hawthorne*, 27 Ill. App. 2d 314, 169 N.E. 2d 678, 681,) and we believe the same observation is appropriate here, particularly in view of the undisputed violation of the Safety Appliance Act.

Petitioner Was Substantially Prejudiced By The Admission Of Evidence.

It cannot be denied that error occurred when, over petitioner's repeated objections, the trial court permitted respondent's superintendent, J. M. Traylor, to testify as to the men in various crafts hired by the railroad since the date of petitioner's injury.

Its object was to create an inference that petitioner could have obtained work with respondent to mitigate damages. There is no reported case allowing such evidence. There are cases reported (*Bowman* v. *Robinson*, 16 F. (2d) 240, 241 (C.A. 9, 1926); *Howard* v. *B. & O. RR. Co.*, 327 Ill. App. 83, 105, 106) when this same question has arisen. None support respondent's position.

Not only was this evidence prejudicial, since it was aimed at diminishing damages by creating an illusion that petitioner could have had work if he desired, but this error of its admission was compounded in the Court of Appeals when it used such evidence to justify the $10,000 verdict by stating, in part: "* * * the jury was warranted in finding that after that time plaintiff could do his regular work, *work as a locomotive fireman or towerman*, or do many types of ordinary work." (App. II, 62a; emphasis supplied.)

Traylor, as noted in greater detail in our statement of facts, testified that in a two and one-half year period after petitioner's injury, the railroad had hired men, towermen, yard clerks and firemen. (App. I, 43a-45a) But Traylor also established the complete incompetency and irrelevancy of the evidence relating to hirings, when he testified on cross examination that none of the jobs had been offered to petitioner, (App. I, 46a) and that he, the witness, did not know of a single instance in which an injured trainman had been transferred to any of the jobs enumerated. (App. I, 50a) Apart from this, there was never any proof that petitioner was qualified for any of the jobs!

In the posture in which the evidence of "hiring" is found in the record therefore, the jury was permitted to mitigate damages solely upon incompetent matter. If Traylor's testimony is to be deemed relevant, the trial court might just as well have permitted respondent to introduce evidence that Montgomery Ward had hired some clerks, or that a transit company had hired some bus driver, even though those jobs had not been offered to petitioner nor a showing made that he was qualified therefor.

And there is more. Traylor was permitted to testify that a c r man had been hired on May 5, 1959, and that firemen had been hired on June 13, 1959, June 26, 1959, and August 28, 1959. (App. I, 42a, 44a) Yet, the record shows, without contradiction, that petitioner *was working at his job of switchman*, on those dates. (T1—149) Again, the witness stated that a towerman had been hired on October 26, 1959 (App. I, 42a) whereas, the uncontroverted proof shows petitioner was then *still on crutches* as the result of the operation on his knee. (T1—152, 153) The evidence as to these hirings was utterly irrelevant. Its only effect could have been to prejudice petitioner in the eyes of

the jury. Yet, we find the Court of Appeals saying the jury could have found petitioner was able to work as a "fireman or a towerman." (App. II, 62a)

As we stated, there is no authority which justifies the introduction of such evidence as Traylor's. Wherever the carrier has sought to introduce evidence concerning its policy relative to employing injured men, the exclusion has been held proper. (See *Bowman* v. *Robinson*, 16 F. 2d 240, 241 (CA 9, 1926); *Howard* v. *B. & O. RR. Co.*, 327 Ill. App. 83, 105, 106 (1945).)

Petitioner Was Substantially Prejudiced By The Exclusion Of Evidence — The Rejection Of An Offer Of Proof Does Not Come Within Rule 61.

To meet the illusion created by Traylor's testimony, viz., that jobs were open and that petitioner could have returned to work at any time, petitioner sought to prove the custom and practice of respondent whenever it found a man fit for work following an injury to issue return-to-work slips to injured employees, and that such a slip had not been issued to petitioner. (App. I, 32a; T3—363, 364). But the trial court rejected this offer of proof. (App. I, 32a). In so doing, it not only worked substantial prejudice on petitioner, but compounded its own error of admitting Traylor's testimony. Certainly, in view of the fact respondent was permitted to create the impression there was a unilateral duty on petitioner to apply for work after an injury, petitioner should have been allowed to show the custom and practice by which injured men were taken back and that such custom was not followed here. Obviously, the proffered evidence met and was relevant to the contention of respondent.

Adding to the prejudicial error of the trial court in excluding petitioner's offer of proof, was the error of the Court of Appeals in treating the exclusion as harmless error under Rule 61.

That such error does not come within the purview of Rule 61 and that the proof should have been admitted under Rule 43(a) of the Federal Rules of Civil Procedure is obvious from *Puggioni* v. *Luckenback Steamship Co.* (CA 2, 1961), 286 F. 2d 340. There the judgment was reversed on the exclusion of a prior inconsistent statement. The Court noted that this did not involve the question of discretion, saying at p. 343:

> "Even assuming, however, the exclusion of this statement was not an abuse of discretion under federal decisional law (see *United States* v. *Allied-Stevedoring Corp.*, 2 Cir., 1957, 241 F. 2d 925), the trial judge should have admitted the statement pursuant to Section 343-a of the New York Civil Practice Act, which is applicable by virtue of Rule 43(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., and which allows a party to impeach his own witness with a prior inconsistent statement when it is in writing and either subscribed or sworn to by the witness."

In *McCandless* v. *United States*, 298 U.S. 342, 347, this Court held that the rejection of an offer of proof did not come within the statute and could not be considered as non-prejudicial. The statute it referred to was the predecessor of Rule 61.

The excluded proof went to the issue of damages and, under the circumstances of Traylor's testimony, its exclusion necessarily worked substantial prejudice to petitioner. Most certainly, the Court of Appeals should not have avoided consideration of the error by reliance on Rule 61.

Here the Congressional intent of the Federal Employers' Liability Act, namely, to afford a railroad worker indemnity against harm, has been as successfully thwarted as if the court had directed a verdict. Indeed, unfortunate to admit, he would have been better off under a Workmen's Compensation statute which secured payment of medical and compensation. This itself points up the grotesque result worked upon petitioner.

II.

THE MANNER IN WHICH RULE 61 WAS EMPLOYED HERE IS AT ODDS WITH DECISIONS OF OTHER CIRCUITS AND OTHER DIVISIONS OF THE SEVENTH CIRCUIT ON ERRORS OF SUCH CHARACTER.—TO INSURE THE CONSISTENT ADMINISTRATION OF THE FEDERAL EMPLOYERS' LIABILITY ACT THIS COURT SHOULD REVIEW THE SITUATION.

In the recent case of *Sears* v. *Southern Pacific Co.*, (CA 9, 1963,) 313 F. 2d 498, a very similar situation was presented. There, also an F.E.L.A. action, the plaintiff appealed although he had received a verdict and judgment for $8,000.00. His sole ground was the refusal of the district court to admit a letter embodying a complaint by a union representative as to a dangerous condition. The Court of Appeals nonetheless reversed and remanded for a new trial saying, (p. 503,) that even though the jury had found defendant guilty, the exclusion of the letter was relevant to the issue of damages. The same is true in this case, and the same result should be reached. The evidence improperly admitted here, (Traylor's,) and the evidence improperly excluded, (O'Connor's,) was relevant to the issue of damages, a substantial part of petitioner's remedy, and in both instances the rulings of the court worked to the prejudice of petitioner.

In *Schillie* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 222 F. 2d 810, 815, (CA 8, 1955,) an F.E.L.A. action, a judgment for defendant was reversed solely on the ground that the court admitted evidence to the effect that members of the deceased's bridge gang had never known or heard of a man falling from a batter post before the deceased fell. The vice of such evidence was said to be that it raised collateral issues which had a tendency to mislead and confuse the jury. In the present case the evidence of "hirings" had a similar effect in the absence of proof: (1) that petitioner had been offered such jobs, and (2) that he was physically qualified therefore.

Rice v. *Louisville & Nashville R. Co.*, (CA 6, 1962,) 309 F. 2d 930, was an F.E.L.A. action where the defense "left no stone unturned to inject intoxication into the case" (p. 933,) and inquired into plaintiff's intoxication prior and subsequent to the date of his injury. These collateral matters were held to have prejudiced plaintiff and caused the court to reverse a judgment for defendant and to remand for new trial.

Here, evidence of hirings, references to statements as to age made to another employer in 1926, and to frequenting a tavern were certainly prejudicial. It cast petitioner, whose work record is best demonstrated by the fact that in 1957 he earned over $6200, and in 1958 over $6400.00 to the time of the injury, as one who avoided work, notwithstanding it was available to him.

We submit that the decision of the Court of Appeals in the instant case cannot be reconciled with the foregoing decisions, thus making for an inconsistent administration of the Federal Employers' Liability Act by the various circuits. That the errors here complained of were preju-

dicial in character and affected this jury's consideration of the damage issue is demonstrated by the verdict of $10,000 that was returned. Respondent's violation of the Safety Appliance Act was uncontradicted and, by its actions, respondent has acquiesced in the finding of the jury that plaintiff's injuries resulted from that violation. Even if one were to accept the finding of the Court of Appeals that petitioner's actual monetary loss was $5,298.41, (App. II, 61a,) the fact remains that the jury was permitted to consider the other elements of damages, notably pain and suffering and the nature and permanency of the injury, in the speculative atmosphere that petitioner could have had other employment with respondent, and that he was physically qualified therefor.

The whole record shows that the court's rulings on evidence were prejudicial to petitioner. The whole record shows, too, that the effect of such errors was to deprive petitioner of the full remedy intended by Congress.

On a broader front, we believe the opinion of the Court of Appeals will have a serious and far reaching effect in F.E.L.A. cases. By its holding a plaintiff is told that in a case where the only issue is the amount of damages, a defendant can with impunity engage in the most erroneous conduct in an effort to reduce the verdict, and, having been successful in its purpose, then tell a reviewing court the only question before it is whether the trial judge abused his discretion. We do not believe that justice is so shallow, or that the remedial and humane purposes of the Federal statutes can be so easily thwarted. We believe this Court should grant certiorari to insure against such results.

III.

THE ADMINISTRATION OF THE DISTRICT COURT'S LOCAL RULE PERTAINING TO IMPARTIAL MEDICAL TESTIMONY IN THIS CASE DEFEATED ITS PURPOSE AND SERVED TO PREJUDICE PETITIONER.

All literature on the subject of impartial medical examination and testimony based thereon assumes that there will be but a single examination. This, of course, is the only conclusion compatible with the real purpose of the procedure, stated by one court to be:

> "'* * * The impartial medical testimony program serves directly and indirectly to discourage the "battle of experts" in the courtroom, which often confuses lay jurors and judges, degrades the judicial process and stigmatizes two great professions.'" (Seminar on Procedure, by Honorable Joe E. Estes, 29 FRD 298.)

Rule 20, as well as any vehicle for an impartial medical examination, has never contemplated that there should be a second examination by a second doctor after one of the parties found that the report of the first impartial examiner was unfavorable. Everything that is written on the subject of an impartial medical examination announces how it can do away with the battle of experts and be a vehicle for an objective view. This purpose is hardly served when two doctors testify, each with opinions at loggerheads with the other. True, the testimony of the second examiner might have been, in the words of the District Court, "a Mexican stand-off," (App. I, 54a) but certainly in the trial of a lawsuit, we are not concerned with such stand-offs.

This is the first case in the history of the impartial medical examination, insofar as our research and experience indicate, where, after a report unfavorable to a

litigant, the court appointed the second doctor, who specialized in the same field, to make a second impartial medical examination, and where one impartial medical examiner testified for one litigant and the second for the other. The chaos and confusion created was at Mayer's expense.

The unfairness of the situation speaks for itself.

In so employing this rule, petitioner was subjected to a disadvantage which should not have obtained in this action based upon Federal statutes. Both "impartial experts" appeared as opposing witnesses, and we believe it obvious that such testimony accomplished the result respondent desired—to confuse the jury.

If the grounds assigned by the trial judge, and accepted by the Court of Appeals, had any validity at all, the only action consistent with fairness and the authority conferred by Rule 20 would have been to return the matter to Dr. Hall with directions to amplify and augment his report in the specific areas desired. This course would permit the rule to serve its purpose, and would have prevented the confusion which arose when the jury was confronted with the spectacle of two witnesses, both appointed by the Court, with opinions diametrically opposed.

This Court, should, we believe at this stage of the impartial medical testimony program, strike down its administration in the manner as here practiced. Otherwise it will become a vehicle and source of greater jury confusion than previously existed.

PRAYER FOR CERTIORARI.

For the reasons urged in this petition, this Court is respectfully asked to grant certiorari in this case and to reverse the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JAMES A. DOOLEY,
111 W. Washington Street,
Chicago, Illinois 60602,
Attorney for Petitioner.

APPENDIX I

Rec.:

26-33 ANSWERS TO WRITTEN INTERROGATORIES, filed April 19, 1960, by defendant, which exclusive of caption and signatures, reads as follows:

26 The defendant Illinois Northern Railway Company, a corporation, by and through H. A. McWilliams, Claim Adjuster, subject to all pertinent objections which may be raised at the time of trial, answers the plaintiff's Interrogatories as follows:

1. On December 18, 1958, was the plaintiff employed by the defendant?

Ans. Yes.

2. If the answer to Interrogatory No. 1 is in the affirmative, state in what capacity.

Ans. Switchman.

3. If the answer to Interrogatory No. 1 is in the affirmative, describe in detail his full and complete duties.

Ans. His duties consisted of passing signals, throwing switches and assisting the train crew in the coupling
27 and uncoupling of cars for the purpose of breaking up groups of cars delivered from connecting lines and consolidating cars for delivery to connecting lines.

4. If the answer to Interrogatory No. 1 is in the affirmative, state whether the plaintiff was given a physical examination at any time prior to December 18, 1958.

Ans. Yes.

5. If the plaintiff was given a physical examination prior to December 18, 1958, state the date or dates of said examination or examinations, the name or names and

addresses of the doctor or doctors by whom he was examined, the occasion for such examination or examinations, and the findings thereof.

Ans. February 13, 1957; Dr. J. Chobot, address unknown; pre-employment physical. Objection pending to remainder of Interrogatory.

6. What were the plaintiff's gross earnings during the year 1957 and from January 1, 1958, to December 18, 1958?

Ans. 1957—$6,270.57; 1958—$6,429.09.

7. What was the basis upon which plaintiff's compensation was computed on December 18, 1958, namely, by the hour, the day, or the week?

Ans. By the hour.

28 8. What was the rate of pay of the plaintiff on December 18, 1958?

Ans. $2.6237 per hour.

9. Was there on December 18, 1958, any provision for overtime compensation?

Ans. No, there was no expressed provision for overtime, however, if a given job could not be completed within the normal working period crews were asked to work overtime.

10. If the answer to the foregoing is in the affirmative, state what provisions for overtime compensation there were.

Ans. If a crew worked overtime it received time and one half for the amount of time it so worked.

11. Have there been any changes in compensation for men doing the same type of work as the plaintiff was engaged in on December 18, 1958, from that date to the present?

Ans. Yes.

12. If the answer to the foregoing is in the affirmative, state the various changes and the effective date of each change.

Ans. Effective December 1, 1959, a three cent per hour cost of living increase went into effect.

13. On December 18, 1958, was the plaintiff working with other men on behalf of the defendant?

Ans. Yes.

• • • • •

20. State the amount of charges for the services rendered to the plaintiff by any doctor or doctors selected by the defendant, stating whether said charges are paid, and if so, by whom.

Ans. Dr. Dale M. Vachout; $210.00 paid by defendant.

31 21. State whether on December 18, 1958, there was in and about the defendant's "26th Street Yard" a certain box car No. IC 33639.

Ans. Yes.

22. If the answer to the foregoing is in the affirmative, state the time and date said box car arrived in the "26th Street Yard" and from what railroad it was received.

Ans. 4:45 P.M., December 18, 1958 from GTW.

23. State when prior to the occurrence out of which this lawsuit arises said box car had last been inspected, the place of said inspection, the name of the person or persons making said inspection, the name of the employer of said persons who made said inspection, and the findings of said inspection.

Ans. At approximately 5:00 P.M., December 18, 1958 at 26th Street Yard, Car Inspector F. Koczanda, employed by defendant, made a running inspection on the ground and found no defects.

24. State whether subsequent to the occurrence out of which this lawsuit arises an inspection was made of box car No. IC 33639.

Ans. Yes.

25. If the answer to the foregoing is in the affirmative, state the date and place of said inspection, the name of the person or persons making said inspection, the name of the employer of said persons who made said inspection, and the findings of said inspection.

Ans. December 19, 1958, Proviso, Illinois, C&NW Yard; M. S. Manzie, employed by defendant and Fred Rieman, employed by C&NW; found six foot section of running board on top of car missing, beginning nine feet from "A" end.

26. State whether at the time of the occurrence out of which this lawsuit arises there was a section missing from the running board on the top of box car IC 33639.

Ans. See answer to Interrogatory No. 25.

27. If the answer to the foregoing is in the affirmative, state the length and width of such missing section and its position with relation to either end of said box car.

Ans. See answer to Interrogatory No. 25.

* * * * *

153-160 MOTION, filed November 29, 1961, together with attached Report of Dr. Thomas D. Hall, which read as follows, exclusive of caption and signature:

153 Now Comes the plaintiff and moves the Court to vacate the following orders, and each of them:

"This cause coming on to be heard for the appointment of an impartial medical examiner to examine the plaintiff, Norman Mayer, pursuant to Rule 20 of the local rules of the United States District Court:

"It Is Hereby Ordered:

"That Dr. Sidney Sideman be appointed as the Court's impartial medical examiner; that said Dr. Sideman examine the plaintiff, Norman Mayer, at his office at 4646 North Marine Drive, Chicago, Illinois, on November 6, 1961, commencing at the hour of 2:30 p.m.; that said medical examiner have available for review any and all hospital records, X-rays, medical history, and such other information as might be available to assist him in making a proper examination and report of the plaintiff.

"That counsel for plaintiff and counsel for the defendant shall deliver to the office of Dr. Sideman at least five days prior to November 6, 1961, all hospital records, X-ray films, medical reports and medical history which the respective counsel might have available or under his control. Said material to be picked up by the counsel delivering it within one week after receipt of Dr. Sideman's report.

"That after the doctor completes his examination he shall forward the original and two copies of his re-
154 port, together with two copies of his bill for services, to Roy H. Johnson, Clerk of the United States District Court, United States Courthouse, Chicago 4, Illinois, to the attention of H. M. Winscott, Deputy Clerk.

"Dated: October 27, 1961."

"This cause coming on to be heard at a pre-trial set on motion of the defendant, for the purpose of raising the following objections to the report of the Impartial Medical Examiner Thomas D. Hall, M.D.:

"1. That the findings and conclusions of said report are based in part on the history and subjective complaints of the plaintiff; and

"2. That said report fails to comment on the problem which led to defendant's request for an impartial medical examination, namely, whether there were any medical findings which would warrant the removal of the plaintiff's left patella at a future date.

"The court being fully advised,

"It Is Hereby Ordered, that the plaintiff be re-examined by a member or members of the panel of examining physicians for othopedics and roentgenology, to be designated for their particular qualifications by the Illinois State Medical Society, for the purpose of rendering a report of the plaintiff's physical condition, based on objective, admissible evidence, including but not limited to a report on the condition of the plaintiff's left patella.

"Enter: /s/ R. B. Austin
Judge

"October 26, 1961."

And in support of said Motion, the plaintiff shows the Court as follows:

155 1. That the defendant had an examination of the person of the plaintiff by Dr. Arthur H. Conley, pursuant to an order entered herein on December 21, 1960.

2. That this case has been on for pre-trial and trial on the following dates: September 30, 1960; January 10, 1961; February 10, 1961; February 27, 1961; March 13, 1961; April 11, 1961, April 25, 1961; May 2, 1961; October 16, 1961.

3. That on May 8, 1961, pursuant to a motion by the defendant under Rule 20 of this Court for an impartial medical examination, an order was entered and the plaintiff was examined by Dr. Thomas Hall, a copy of whose report is hereto attached.

4. That the rule does not encompass multiple examinations of the person by doctors in the same field; that to allow an examination by a second so-called impartial medical expert deprives the rule of its very purpose, namely, to obtain the impartial opinion of a disinterested doctor, and further, that if such were the case, then any time a litigant is dissatisfied with the report of an impartial examination, he may seek further examinations under this rule, all of which is neither within the contemplation, the purpose, nor the letter of the rule.

In the alternative, the plaintiff shows the Court
156 that the above two orders have been entered, and under the terms of one order, the physician's attention is directed to the left patella, and he is prohibited from taking into consideration history and subjective symptoms. These are matters not proper for an order; whether or not subjective symptoms and history would be admissible are questions of evidence and a doctor could not make an examination without knowing such facts.

Wherefore, in the alternative, the plaintiff moves the court to vacate the order dated October 26, 1961.

157 Affidavit in support of Motion.

158 June 13, 1961

Roy H. Johnson, Clerk
United States District Court
United States Courthouse
Chicago 4, Illinois

Re: Norman Mayer

Dear Sir:

The above individual was seen in my office on June 2, 1961 for evaluation of the complaints and physical findings allegedly attributable to the accident said to have occurred on December 18, 1958. He stated that on that date while working for the Illinois Northern Railway he tripped and sustained a twisting injury to the left knee and other bruises about the body. He stated that he had no other complaints at the time of my examination with the exception of those referable to the left knee. He stated that in addition to the twisting injury he fell on the knee and developed pain and swelling. He stated that he received physio therapy and was out of work for a period of approximately four months and then was able to return to work for a period of four months. He stated that because of continued discomfort and swelling and a feeling of insecurity that in September 1959 surgery was performed and the knee cartilage was removed from the knee. The patient stated that he continues to have considerable discomfort in the left knee at all times and with varying degrees of severity dependent upon his activity. He stated that swelling still occurs after walking or standing for any extended period. He stated that after sitting for a period of time the knee becomes more uncomfortable and that upon arising there is temporary relief with initiation of ambulation but that there is subsequent resumption of discomfort after a short period

of ambulation. He stated that there is some aggravation with changes in the weather and especially damp weather. He stated that there was additional discomfort with attempts to bend the knee. The patient did not appear anxious or tense during the interview and was cooperative.

On physical examination which was essentially confined to the lower extremities, the patient stood erect, walked with a slight limp on the left lower extremity but did not appear acutely ill. Examination of the anterior aspect of the left knee revealed a three and one half inch anterio-medial scar from a surgical incision over the medial joint space. With the patient in the supine position there was an obvious loss of approximately five degrees of complete 159 extension as compared with the opposite knee. There was no evidence of joint fluid abundance at the time of my examination. The patella did no ballot. The patient had a normal degree of valgus of the knee. The patient had a normal range of flexion of 137 degrees to an angle of 43 degrees. There was no evidence of instability of the cruciate or collateral ligaments. No popliteal swelling or pulsations were present with the exception of the normal popliteal pulse. The patient complained of pain with the grinding test which he localized to the medial joint space. Patellar crepitation with motion of the patella over the femoral condyles was present to a minimal degree. The patient complained of tenderness over the medial joint space with deep palpation and some thickening and bulging was present with flexion of the knee. Other findings in the lower extremities were as follows:

	Right	Left
Length	34 in.	34 in.
Thigh circum. (3 in. Sup. patellar)	18¼ in.	17 1/8 in.
Thigh circum. (6 in. Sup. patellar)	21 in.	20 in.
Knee circum.	16½ in.	16½ in.
Calf circum.	15 in.	14 in.
Ankle circum.	10½ in.	9½ in.

The patient had a congenital club foot with moderate deformity in the left lower extremity. The circulation in the extremities was apparently normal.

X-rays were obtained of the knee which revealed the presence of moderately advanced hypertrophic osteoarthritis of the knee. There was no evidence of fracture or acute pathology. There was an obvious narrowing of the medial joint space present and hypertrophic lipping of the articulating margins of the medial joint space were pronounced. Comparison with other films taken before surgery revealed that there had been an increase of the hypertrophic changes and that there had been increased narrowing of the medial joint space subsequent to the surgery.

Conclusions:

This patient may have sustained multiple bruises and contusions resulting from the injury and accident as described. These have apparently healed without moment or complaints. Any shock to his nervous system was not apparent to me at the time of my examination and its previous existence must be substantiated by other examiners who have seen the patient during an earlier phase of his disability. His complaints referable to the knee are apparent. There was apparently a pre-existing osteoarthritis of the knee which has shown evidence of advancement on radiography

with most evident changes at the site of cartilage re-
160 moval. There is a permanent restriction of extension of the knee joint which may be attributable to hypertrophy of the anterior attachment of the medial semilunar cartilage at the point of resection. In addition there appears to be a resulting chronic synovitis of the knee associated with the hypertrophic changes and prolonged irritation prior to and subsequent to surgery. This has resulted in recurrent intra-articular swelling. No swelling was observed at the time of my examination but it must be appreciated that I examined the patient in the morning and that he attributed the swelling to prolonged walking or standing and that he stated it worsened with the passing day. There appeared to be weakness of the quadriceps which might be improved with a rigorous exercise regime but a normal quadriceps volume may not be obtained. It is probable however that the patient could regain adequate functional strength. The crepitation, aggravation of discomfort with weather changes and x-ray findings of hypertrophic changes, and the discomfort with rest and temporary relief with initiation of motion are all manifestations of a hypertrophic osteoarthritis which undoubtedly to some extent preceded the injury but conceivable aggravation must be considered. I do not have any knowledge of the pre-trauma measurements in the lower extremities but the presence of a club-foot would indicate the probability of some discrepancy. This is especially true about the ankle. It is apparent however after perusal of the measurements of other examiners that there has been an increase in the discrepancies. This would be anticipated in an extremity which had been subjected to surgery. I do not believe that this patient would be able to return to an activity which is somewhat precarious and dependent upon strength and dis-

ability in the knee with the knee in its present condition. In addition I believe it unlikely that he will regain sufficient function to permit resumption of his former occupation.

Very truly yours,

/s/ Thomas D. Hall M.D.

Transcript Vol. 1:

61 WILLIAM JOSEPH JESSE, called as a witness in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Dooley.

62 My name is William Joseph Jesse. I am a switchman employed by the Nothern Illinois Railroad since 1939.

64 I was a member of a crew working with Norman Mayer on December 18, 1958 in the Illinois Northern

74 yard. I was the hind man, and I was working away from the locomotive where Mayer was working.

80 I first learned of his injury when I returned to the yard office. He was leaning against the wall, and the yardmaster and Mr. Cleveland were with him. I saw one car after the occurrence, an I. C. car. It was on the siding.

82 I went down and looked at it. Someone had told me that the catwalk was missing before I went down. There was a conversation between Mr. Cleveland and Janacek, and when I looked at the catwalk I found that it was missing from the top of the car.

A catwalk is provided for the switchman on the roof of the car. It is a safety appliance, and was made of metal.

MICHAEL MANZIE, called as a witness in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Dooley.

My name is Michael Manzie. I am general mechanical foreman for the Illinois Northern, and was so employed on December 18th and December 19th, 1958. As such, I had occasion to inspect I. C. Car No. 33639 on December 19, 1958 in the Proviso yard of the Chicago North Western.

I appeared with Mr. Lindley, who was then my superintendent, relative to an accident involving this car.

I found that a portion of the running board or catwalk was missing, approximately six feet in length, at a point nine feet from the A end.

I had occasion to write Mr. Lindley of the Illinois Northern Railway Company as to my findings.

NORMAN MAYER, plaintiff herein, called in his own behalf, testified as follows:

Direct Examination by Mr. Dooley.

My name is Norman Mayer. I was born August 16, 1906. I am now fifty-five. On December 18, 1958 I was fifty-two. I had an eighth grade education, and took some business college, but did not complete it. I commenced railroading in 1926 for the Santa Fe Railroad Company, and worked there until 1932, when I left because of the depression, and then got whatever work I could do. I entered the employ of the Northern Illinois Railroad Company in May, 1934. I was given a physical examination, and started as a section man. In February, 1937, I became a switchman, and prior to that I was given a physical examination. The doctors were of the railroad's choice. From 1937 until December

18, 1958, I worked as a switchman, and was in good health. Since I have been an infant, my left foot was a club foot, but it did not bother me, and I did not have to
123 wear any special shoes. I participated in sports as a young man, and did not have any trouble with my foot. There is no noticeable difference between my right and left feet. In 1955, I was in an automobile accident in May, and I hit my head against the dashboard and had some
124 bruises and discoloration of the leg. I was under the care of a doctor for five to seven weeks, and returned to my regular work, and had no trouble doing it.

My work is to throw switches to classify the cars, getting on top, tying the brakes down, and this requires getting on cars when they are in motion.

125 On December 18, 1958, I was working with Tom Cleveland and William Jesse. Cleveland was the conductor. Louis Vlasicak and Paul Kruzil were the engine crew. I was the head man, and Jesse was the hind man.
126 The head man follows the engine and pulls the pins to disconnect the cars, while the hind man works the yard,
127 throwing the switches. The conductor is in charge. I was a qualified conductor. My shift was from 4:00 P.M. to Midnight, and there was extra pay beyond midnight. My annual earnings were in excess of $6,000.00.

128 A car inspector is one who inspects cars delivered to the Illinois Northern by and from other railroads. In this particular yard we handled cars owned by many railroads. This is true of every railroad yard.

The weather on this evening was cold and clear and dry.

129 There were no artificial lights in the yard. I was dressed with warm clothes, plus overalls and jacket, and wore a heavy soled shoe, like an Army shoe.
130 At 8:00 P. M. I was present when the yardmaster,

Frank Janacek, gave instructions, and these were to go over to the main line and get a cut of cars for the North Western and shove them out. The main line runs east and west. There were between eight and twelve cars
131 in that cut. There was a North Western engine waiting for these cars. It was located between the Illinois Northern crossing and the C. J., Chicago Junction switch, which is the highspeed Y-switch onto the Chicago
132 Junction. We came with the locomotive from the east towards the west, and the entire crew was riding.
134 The locomotive approached the standing cut of cars moving in reverse. There is a coupler on the locomotive just as there is on a railroad car, and a joint was made between the locomotive and the easternmost car. After that the engineer was sitting on the right side of the train, which would be the south side, with the locomotive to the east, and the fireman would be on the north side. The cars were all coupled one to the other before we got
135 there. I had to couple the air hose from the eastern-most car onto the locomotive for the air brakes on the train.

Afterwards the locomotive proceeded east, and I was
136 on the front end of the engine. The locomotive continued about 25 to 30 car lengths and eventually went
137 into the Q lead, and we pulled down over a switch. I dropped off, and the conductor gave us a stop sign.
138 After the engine and three cars had gone beyond, the cut stopped. I knew what had to be done to put the cars in place so that the C.&N.W. locomotive could pick them up. We backed up to the high-speed Y on the C. J. main, and through the Y, and then placed the cars over a
139 switch. The North Western locomotive was between the switch and the crossing. When its engineer would contact the cars, the locomotive would be facing north, and

he would move into them at the switch after we had moved them.

When they shoved back, I got on top of the third car. The conductor, Cleveland, was on the hind car. Jesse
140 was out at the C. J. switch. I stood about the center of the third car. I had to be on top, because it is an S curve, and when you start back there the only one that can see you is the fireman. I was doing my job the way I had been instructed to do it, and this was the customary and usual way. There are catwalks there for men to perform the kind of work I was doing on this night. I had
142 a battery lantern in my hands. It was used to pass signals. In railroading, all the work is done by signals communicated to the engine crew by a switchman.

143 When we were shoving back, I proceeded to walk back towards the engine so I could climb down on the side of the car and be next to the engine to make the cutoff. I got on the third car from the engine, and I had walked forward over the second car and started to
144 walk over the first car. There wasn't any artificial light in the yard. I had walked six to eight feet over the top of the first car when I came to the end where the part was missing and my heel caught and it threw me, twisting my leg underneath me and throwing my weight on my leg. I noticed shooting pains in my knee, and I fell to the roof of the car.

145 The engineer stopped. I lay there for a minute or two, got myself down the steps of the engine, and we proceeded to shove the cars over that switch. I then rode up to the roundhouse, got off and informed the yard-
146 master about it. My knee was terribly sore. I was having difficulty in bearing weight on it. I told the yardmaster I wanted to see a doctor, and he himself took me to Dr. Vachout, who was located around Western and 16th. I

saw one of his assistants, and he gave me a whirlpool treatment for an hour, put some kind of ointment on my knee, wrapped it and bandaged it, and I went home.

I saw Dr. Yachout the following morning, and he X-rayed it, and they gave me heat therapy. I continued to see him every day, then three times a week or so, and then twice a week. He never discharged me. I ceased going to him when the claim agent called at my home and said he had made an appointment to see Dr. Conley. This was in February, 1959. Following that, I went to a doctor of my own choice, Dr. Leo Miller. I was noticing swelling and pain in the knee and that it was hard for me to keep my balance, and it had a tendency to swell if I did much walking.

I returned to work on April 29th or April 28th, and worked until August 28th. During this period my knee was very painful, and at the end of a day's work would be swollen. I was not sure of myself. I would stagger now and then. At home I would sit in the tub with epsom salts and hot water every evening that I came home, for about an hour or more. I tried an electric pad, and also tried that violet ray light.

I saw Dr. Miller August 28th, and he ordered me into Alexian Brothers Hospital, and surgery was performed September 1, while I was asleep. When I woke up there was a bandage on the outside, running nearly to the thigh. I was hospitalized thirteen days, left the hospital on crutches. I was on crutches for about four months or a little longer, and I continued with therapy treatment with Dr. Miller. He did not discharge me.

Since August 28, 1958 until the present, I have not done any gainful work. The knee plays this part in the work of a railroad man—you have to get on the moving cars and get up, tie cars down, walk the catwalk while

the cars are moving. In getting on a moving car, you usually swing on with one foot.

My knee is still weak. I still have pain. If I do any amount of walking, I have swelling. I cannot stand in one position too long, and the knee joint is still weak. Changes of
155 weather also affect me. In the morning it is hard to get the knee to function right. I had none of these problems prior to December 18, 1958.

162 *Cross Examination by Mr. Schmidt.*

It is true that the occurrence happened at 9:05, and I wrote that down.

163 *Direct Examination by Mr. Dooley.*
(Continued with permission of the Court)

I wrote down on a piece of paper the number and ownership of the car. I have it at home, and will bring it with me tomorrow.

Cross Examination by Mr. Schmidt (Continued).

It shows I. C. 33639.

164 It is not true that the North Western cut that was shoved had twenty or more cars in it.

177 When you are on the third car, neither the fireman nor the engineer can see you when going around a curve. No one witnessed my fall. The engineer stop-
179 ped the cut. I was on the first car, and the engineer could see me go down. We were still partly on the
180 curve, and I was 20 to 25 feet from him. I fell at the section where the running board ended on the A end. This would be about 25 feet from the engineer. He could see that far back. I do not know if anyone gave a
181 signal to stop the cut. Cleveland did not pass a stop sign.

Defendant's Exhibit 1 and 1-A bears my signature and "I have read the above two-page statement and it is correct. Norman F. Mayer."

183 (Statement read from: "The rest of the crew was on the ground at various points and there were no witnesses to my fall.")

I have not seen a doctor for treatment since March,
184 1960. I stopped going to Dr. Miller because he kept asking for his bill. I have not gone to Dr. Vachout. I presume I am still carried on the seniority rolls of the Illinois Northern.

185 I went to Dr. Addison for an examination at my lawyer's request. Since my operation of September, 1959, the Illinois Northern has offered me nothing by way of work. I have not tried to work elsewhere. In the
186 Santa Fe I had experience as a yard clerk. I also
187 worked as a car inspector and as a caller. Defendant's Exhibit 2 is an application for work at the Santa Fe.
188 I signed this application on November 5, 1926. It is in the same condition now, except that it is quite yellow, as when I signed it.

(Objection as to materiality and as to impropriety in reading from it.)

191 It shows on this Exhibit I was born in 1902. I reapplied and filled out another application in 1929. Exhibit 3 is in my handwriting, dated January 4, 1929. I suppose I said my date of birth was August 16, 1902. That is what it shows.

192 I applied for work at the Illinois Northern on
193 February 13, 1957. I also indicated I could do the work of a yard clerk and a fireman.

My left knee was bruised in an auto accident in
194 1955. I was treated for both knees. Both knees were X-rayed. I did not have any other injury to my knees.

Q. Did you not, on January 17, 1957, slip between tracks 5 and 6 and strike your right knee against the tie and track?

Mr. Dooley: I assume he is going to show he injured his knee in this incident.

The Witness: A. I do not remember.

Mr. Dooley: I assume counsel will connect this up.

The Court: I assume so. I always assume that. If it is not being offered, he can have it marked for identification. It is when he offers it, that its materiality becomes of some consequence.

195 The Witness: A. Defendant's Exhibit 5 is in my handwriting.

Transcript Vol. 2:

224 (Proceedings were resumed before the Jury, as follows:)

The Witness: I had a lantern on December 18, 225 1958. It had a four-cell battery in it. I had that lantern when going across these cars. I could see the running board as I walked across these cars. I could see the running board as I walked across.

Q. Where were you looking when you were walking across this first car? By that I mean the one next to 226 the engine.

A. Well, just walked along. Probably turned around to see where the men were on the ground. I probably was looking around to see where the men were on the ground.

227 The box cars were about two feet apart, and the catwalk overhangs the car.

228 I had shoved other cuts around the yard.

229 At home I help my wife around the house, and go to my mother's, and do shopping for her. I cannot sit down all day. I am up and down. I live on the second floor and probably go in and out two or three times
230 a day. I vacuum, and do dishes, but cannot get down on my knees to do any scrubbing.

Q. You have been in Murphy's Tavern on several occasions in April of 1960?

A. Could have been.

Mr. Dooley: Your Honor, that is not material as to—

231 The Court: I am beginning to wonder.

Mr. Schmidt: I think it is. The man said he could not afford medical treatment, your Honor. I think this has a bearing on whether he could or could not afford medical.

Mr. Dooley: He did not say he could not afford medical.

The Court: I never heard him say he could not afford it. He said he had not received any, and he said he had not sought any.

Mr. Schmidt: He said he could not pay for any when Mr. Dooley asked him why.

Mr. Dooley: That is not any showing that he spent money at Murphy's tavern or anything like that. And this is just an effort to defend this case on a wholly immaterial issue.

Mr. Schmidt: I am going to ask him if he spent money at Murphy's.

Mr. Dooley: That is objected to, your Honor.

232 The Court: The objection is sustained. I do not care where he spent his money.

Mr. Schmidt: Mr. Dooley has indicated he does not have money—on direct examination, that he did not go back to Dr. Miller because he did not have money.

The Court: Because he could not pay the bill or did not pay the bill.

Mr. Schmidt: I think we are entitled to show that he had money.

Mr. Dooley: Then we get into a question of the wealth of the defendant. That is what it will lead to.

The Court: That is right. The objection is sustained.

The Witness: I know that a missing running board
233 is a safety appliance defect. I knew that in December, 1958.

Redirect Examination by Mr. Dooley.

In my years of railroading prior to December 18, I have never seen a section of running board on top of a car missing.

234-235 In my dealings with Mr. McWilliams, the claim
236 agent, I asked him about other work. At my home one day I asked him if there was not something else I could do around the railroad, and he told me no, that the company does not do that any more. In railroading there is such a thing as seniority, which means the oldest person had the choice of jobs, or if there should be a layoff, staying the longest. There is a list or roster, and there are various unions for railroad work. On the
237 switchman's seniority roster, I stood five or six. I followed Mr. Cleveland in seniority.

I did not apply for work as a fireman, and they usually have extra firemen. This means in order to get work as a fireman, there is a standing on the extra board by way of time and years of service at that job. There was on the extra board firemen with years of seniority at this time and at the time of the occurrence.

238 With reference to clerking, there is another union, and if one would go from the job as switchman to

clerk, he would be at the bottom. There is an extra list, and it depends upon how much work there is as to
239 whether he works. I would not know whether there are yard clerks who do not have regular jobs. If I obtained employment with some other employer, I would lose my seniority as a switchman. When I asked McWilliams for some type of work, I did not specify any type of work around the railroad.

I was shown some applications which I signed in
240 1926 for the Santa Fe. On those particular applications, my birth date was 1902. At that time you had to be twenty-one years of age to do railroad work, and I was in fact twenty years of age. My seniority as a switchman goes back to 1937. I had occasion to put in
242 extra time during those years. I never refused to work overtime.

Recross Examination by Mr. Schmidt.

246 It is a highly unusual occurrence to have a running board missing. I didn't see any bolts around. There was no board to be seen.

Since September, 1959, when I was operated on, I have not gone to the Superintendent of the Illinois Northern to ask for a job.

(Witness excused.)

249 DR. LEO FREDERICK MILLER, called as a witness in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Dooley.

My name is Dr. Leo Frederick Miller. I graduated
251 from the University of Illinois in 1929. I am a Diplomate of the American Board of Orthopedic Surgery, and Fellow of the American Academy of Orthopedic Sur-

gery, a Fellow of the International College of Surgeons, a Fellow of the American College of Surgeons, a Fellow of the Industrial Medical Association, etc.

252 I have had experience in reading and interpreting X-rays.

253 On March 19, 1959 I saw Norman Mayer at my office. I had never seen him before. He had a com-
254 plaint of instability in going up and down stairs, discomfort and pain on prolonged standings, stiffness in the knee joint when sitting too long or walking too far. I examined him, and there was a protective limp in his ambulation or walking, which was quite prominent, and I found an irritability of the knee joint by a compression test and other tests.

255 I had X-rays made in my office.

256 Following my studies and examination, I felt that he had an internal derangement of the knee, due to a cartilage tear. He gave me a history of the accident. I thought he should go back and give a trial of work.

257 I saw him on August 29, 1959, and at that time there was a marked swelling because of joint fluid in the knee joint. This man had sufficient findings with a trial of work that surgery should be performed in this knee joint. He had complaints of pain, swelling, and sore-
ness in the knee, and the swelling was obvious, as I
258 have noted on my record. When I use the term "fusion" [sic], I mean a collection of fluid in the knee joint itself. It is a fluid that is produced by an irritative substance of the lining of the joint.

264 After X-rays and examination, I had occasion to perform surgery on this man, which consisted of exposing the joint itself, and the intricate part of the
265 joint itself, which contains the meniscus, a cartilage

lying between two bones. We found that there was a shredded area, as if someone had roughened the whole cartilaginous layer, and there were areas of irritation.
266 We removed the cartilage and injected cortisone into the joint. The medial meniscus, which was the shredded point, is the washer of the knee joint. I am certain that this was caused by an injury, because our carti-
267 lages are torn by trauma. When this washer has been shredded, it is like sand in a motor and continues to keep on roughening the bone.
268 We hospitalized the man for twelve days, got him up on crutches, and then saw him later, in which physiotherapy was instituted.
269 On November 13, 1959, I found a recurrence of swell-
270 ing in the joint, due to the presence of fluid. On December 11 there was more accumulation of fluid, and it was necessary for us to withdraw it and inject corti-
271 sone. On February 8, 1960 he had a slight amount of fluid present, all of which indicated evidence of pain
272 in the knee joint. On February 29, 1960, he still had swelling in the knee joint. It was approximately one inch. I saw him on March 21, 1960. He complained of pain in the knee joint, but I did not notice any swell-
273 ing. In a man 52 years of age, with arthritic phenomena in the knee joint, work capacity of the extremity is diminished.

I did not discharge this man. He cooperated with
274 me during the time he was under my treatment. I talked to Mr. McWilliams, the claim agent. He sent me
275 a card. I sent him a report.

I had additional X-rays made this morning. Be-
277 tween today and March 19, 1959 there have been changes
278 which are taking place in the knee joint. The overlapping spur that is occurring is evidence that this

individual is developing right along an irritative phenomena to bone, which is not present in the uninjured leg.

These conditions are progression of the trauma I found
279 on surgery, because the shredding of the cartilaginous surface affects the bone itself. How far this will progress, I cannot foretell. His condition may well
280 cause pain. The instability of the knee joint is caused by the irregularities that are present.

284 The knee joint is one of the most active joints in the whole body, outside of the hand. It performs the function of locking the leg in a semi-flexed or half-bent position.

286 I am familiar in a general way with the duties of a railroad switchman. In my opinion, with the left knee
287 joint as I found it on March 21, 1960, it would be dangerous for this man to carry on an occupation which would entail climbing and jumping.

Cross Examination by Mr. Schmidt.

In February, 1960, I knew the work of a switchman in a general way. Following the first examination, I felt that he should return to work. I did not do that in February, 1960. On February 29th I said I saw him and he felt insecure.

290 I have my notes. On September 26, 1959 he had
291 no swelling or fusion [sic]. On October 2, 1959 I noted his condition was excellent, and on October 9, 1959, I noted that his quadriceps were strong; and on November 13th we noted the swelling had recurred. On December
292 11th we did an operation, and on December 19th it looked pretty good. On January 18th there was no
293 swelling. On March 21, 1960 there was no fusion [sic], but he still had pain, and this could be ascertained by palpation.

At the beginning, I recommended exercises. In the operation, I took out all diseased material which was causing irritation. I have performed three or four hundred of these operations, and I have operated on people in all walks of life. My experience on persons resuming their normal work after such an operation has been dependent upon these factors are: the length of time the irritative substance was present; the amount of damage that the irritative substance had done to the cartilage. I do not know what the figures are for this particular age group, but with age our results have gone down lower and lower as to feeling of security, pain and a fusion [sic] after activities. A person is off his normal occupation three or four months, I said in my deposition. With refrence to athletes, a lot of them will never go back to athletics.

There were no prior injuries except that he had a left club foot at an early age in life. The left knee was somewhat smaller on my original examination. This could be due to the club foot.

Redirect Examination by Mr. Dooley.

The left knee was normally smaller in this man than the right knee. The significance of swelling in the left knee would be that there would be more swelling. The condition of the club foot at infancy had no relation to the condition of the knee. My note read, "He had no prior injuries to the left knee as far as any notation I have here goes."

With reference to men returning to work, ordinarily these people can go back to work, but the age of the person and the amount of time that the disturbance has been there prior to surgery has entered into the result, in that the reparative power of the body is diminished.

306 Where an irritation has occurred for a protracted period, it is constantly causing damage. The body never has had a chance to repair itself until the irritative agent is removed.

I sent what I extracted to the laboratory and found a focal degeneration of the semi-lunar cartilage. This is consistent with my diagnosis.

336 NORMAN MAYER, plaintiff herein, recalled as a witness in his own behalf, testified as follows:

Direct Examination (Continued) by Mr. Dooley.

Plaintiff's Exhibit No. 20 is in my handwriting. It
337 was made December 18, 1958 at 9:05 P. M. This is the document I referred to concerning ownership of the car and the number of that car. It is all in handwriting, with the exception of the printed portion.

(Plaintiff's Exhibit 20 was offered in evidence. Objection sustained.)

338 Defendant's Exhibit 4 is an application that I made to work as a switchman for the Illinois Northern Rail-
339 way Company in 1937. I told the Illinois Northern Railroad Company in the year 1937 that the date of my birth was August 16, 1906.

340 Mr. Dooley: Ladies and gentlemen, I am about to read a letter from Dr. Vachout, dated January 30, 1959 and directed to Mr. E. L. Lindley, Illinois Northern Railroad Company, Chicago, Illinois, in re Mayer L. D. A. 12-18-58.

"Dear Mr. Lindley:

"This patient was originally injured when while walking over a catwalk on a car he twisted his left knee. He reported to this office the same day the injury occurred. And the original diagnosis was severe

sprain of the medial collateral ligament of the left knee.

"Originally, the knee was moderately swollen on its
341 medial aspect, quite tender. Weight bearing was painful to the point which necessitated the use of crutches for approximately one week.

"Under the usual conservative management of whirlpool, diathermy, and supportive bandaging, plus medication, recovery has been slow. This medical report of his knee still remains—"

Pardon me. This is a carbon copy I am reading.

"The medial aspect of his knee still remains moderately tender with residual swelling present.

"The long convalescence in a wrenching with ligamenous stretching such as occurred in this patient is not unusual. On his last visit, intra-articular and periarticular coretone was injected into the knee in an attempt to hasten this recovery, although it probably will be another ten days to two weeks before he can return to his regular employment as a switchman, which necessitates a marked amount of agility in getting on
342 and off moving cars.

"Very sincerely yours. M. D.

The date on the letter is November 30, '59, the way it appears to me.

And the changes in the rate of pay which we have agreed upon—may I read these, your Honor?

The Court: Please.

Mr. Dooley: On December 18, 1958, it was $20.99 daily.

On November 1, 1959, there was an increase to $21.23 daily.

On May 1, 1960, there was a further increase to $21.31 daily.

On July 1, 1960, there was an additional increase to $21.74 daily.

And on March 1, 1961, there was a further increase of $22.18 daily.

343 The operative record, ladies and gentlemen, which is part of this exhibit, Alexian Brothers Hospital, entitled "Operative Record":

"Name: Mayer, Norman Room: 276 Bed: 2

Surgeon: Dr. L. Miller

Name of Operation: Meniscectomy

Postoperative Diagnosis: Same

Gross Findings: (Describe all pathological findings and all organs explored, normal or abnormal)

Free fluid in the left knee joint with the medial meniscus lying free in the joint space with a marked osteochondritis of the collagenous portion of the femur noted with osteoarthritic changes along the borders of both the tibia and the femur.

Procedure:

S-shaped, medial anterior incision was made, carried downward, exposing the capsule which was bulging. Capsule was opened, free fluid exuded from same, yellow in color, containing particles of tissue. The medial meniscus was lying free in the joint space. Same was removed and the osteochondritic areas were

344 curetted free of the soft cartilaginous tags. Closure was then made in layers. 5 cc. of dihydrocortone was injected into the closed capsule of the knee and the chromic was used in closing the various layers through the subcutaneous tissue. Silk was then used in closing the skin."

And then, in the "Surgical Pathology Report":

"Specimen: Medial meniscus removed left knee

Gross Examination:

The specimen, received in Zenker's solution, consists of a semilunar portion of cartilage measuring 4.5 x 3 x 1 cm. One end bears a nodular mass of poorly lobulated yellow adipose tissue overlying cartilagenous shreds. The adjacent cartilage appears fibrilar and partially fragmented. The remainder of the cartilagenous surface is smooth and glistening.

Microscopic Examination:

Sections reveal fibrocartilage and synovia. The cartilage is composed of chrondrocytes within lacunae in a dense matrix which focally appears fragmented and disrupted. The synovia is covered by the usual cuboidal
345 cells supported by loose fibrous connective tissue within which are dense collagenous bands resembling tendon, small vessels and aggregates of signet ring fat cells.

Diagnosis:

Focal degeneration of semilunar cartilage."

The bill, also, was $399.56.

Transcript Vol. 3:

361 JOSEPH P. O'CONNOR, called as a witness in behalf of the plaintiff, testified as follows:

362 *Direct Examination by Mr. Dooley.*

My name is Joseph P. O'Connor. I am General Chairman and Local Chairman of the Brotherhood of Railroad Trainmen, which takes in its membership switchmen.

When an employee of the Illinois Northern has been injured at work, the usual and customary procedure followed by that road is to give him a physical examination before returning to work.

363 (The following offer of proof was made, outside the hearing of the Jury:)

Mr. Dooley: Your Honor, I desire to show by this witness that it is the custom and the practice of the railroad company, when it finds a man is fit to go back after an injury on the job, to give him a return-to-work slip; secondly, I likewise intended and offer to prove by this witness that it is the custom and practice to, if a man has been injured and who does not return to work within 30 days after he has been found able to return to work, to take him off the roster.

371 (Objection sustained to the said offer.)

Transcript Vol. 4:

(Proceedings were resumed before the Jury, as follows:)

455 PAUL J. KRUZIL, called as a witness in behalf of the defendant, testified as follows:

Direct Examination by Mr. Schmidt.

456 My name is Paul Kruzil. I am a fireman for the Illinois Northern Railway.

459 On this night I recall seeing Norman Mayer. He was
460 on top of the car right next to our engine. I did not see him fall at any time.

465 *Recross Examination by Mr. Dooley.*

I learned that Norman Mayer was hurt. The engineer told me when I asked what the delay was.

466 FRANK JANACEK, called as a witness in behalf of the defendant, testified as follows:

Direct Examination by Mr. Schmidt.

My name is Frank Janacek. I am a yardmaster. I
467 was employed by the defendant on December 18, 1958. I became aware of an injury to Norman Mayer, a switch-
469 man, when he reported to me in the office. I took him
470 to the doctor about ten o'clock. He was in my office about thirty minutes before I took him to the doctor.
472 I don't know when the North Western cut was shoved.

Transcript Vol. 5:

2 THOMAS D. HALL, called as a witness on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Dooley.

My name is Thomas Donald Hall, and I am a doctor of medicine and practice as an orthopedic surgeon.
5 I am a member of the Chicago Medical Society, the Illinois Medical Society, the American Medical Association; I am a Diplomate of the American Board of Orthopedic Surgery; I am a Fellow in the American Academy of Orthopedic Surgery; I am a member of the Chicago
6 Orthopedic Society; I am a member of the Clinical Orthopedic Society.

On June 2, 1961, at the request of the Court as an impartial medical examiner, I made an examination of Norman Mayer at my office.
7 I had never seen him before, and I have never seen you before, and I have not discussed my testimony with you.

He stood erect and walked with a slight limp of the lower extremity. My examination was confined to the lower extremities, and on the anterior aspect of the left knee there was a three and one-half inch scar from a surgical incision.

I placed him on his back, and there was an obvious loss of five degrees of complete extension, meaning that the patient could not completely straighten out his leg. Plaintiff's Exhibit 22 and Exhibit 21 are true and correct drawings of the knee joint of a human person. Exhibit 21 is a representation of a section taken through the side of the knee joint as though someone had actually cut the knee straight down the middle and taken a picture. The knee joint is essentially a hinge joint. If the patient bends the knee, the tibia moves back so his knee is bent, and this is done as a result of the muscular action of the posterior muscles of the thigh. The straighten the knee, the quadriceps muscles function by going through the patella. The knee itself is an articulation between two bones, and our knee functions as a hinge joint. It isn't supposed to go to the side. The function of the medial meniscus is that of a gliding mechanism for the femur on top of the tibia. The patient had a normal degree of valgus of the knee. I measured the quadriceps muscle at a point three inches above the kneecap. I felt there was some weakness of the quadriceps in comparison with the opposite knee, and this was apparent on the measurements, in that there was less volume in the thigh on that side as compared with the other. The thigh three inches above the kneecap was 18¼ inches on the right and 17½ inches on the left. The motion of the kneecap over the condyle of the femur dem-

onstrated a sensation of roughness palpable to my hand.
22 This indicates some roughening of the surface of the bones that are in contact. It can be an aftermath
23 of an injury to the knee joint. I saw X-rays. These conditions, in my opinion, can cause pain.
24 These conditions, in my opinion, can cause insecurity in the knee joint, since it is much easier to bear weight on a straight knee, and the inability of this patient to put his tibia immediately underneath his femur means that he has to have additional strength in order to keep that from collapsing on him. He has lost his gliding mechanism.
25 X-ray Exhibit 12, taken August 29, 1959, shows that
26 between the bones there is a soft gristle-like material, and it does not cast the same shadow that an X-ray does. X-ray Exhibit 14, taken in 1959, is an anterior posterior projection of the knee joint.
27 Again, there is cartilage sitting here, but that is not what is called the semi lunar cartilage. The joint looks normal with the exception of that narrowing. The X-ray does not show anything about the condition of the medial meniscus, the ligaments or such. Thus, with the exception of a narrowing, it was a fairly normal joint.
28 Plaintiff's X-ray Exhibit 6, taken three years later, shows more narrowing at the joint space, and this indicates irritation and, essentially, that is inflammation of that joint.
29 This could be a painful condition. There is a change in the knee joint space between the film taken in 1959 and that taken in 1962. This condition could be due to an injury.
30 This change represents an active process going on between the two dates. This is what we call an osteoarthritis.

X-ray Exhibit 17 was taken August 29, 1959. The other exhibit is dated March 23, 1962. There is a fragment of bone called an osteophyte on the latter film not present on the early film and indicative of response to the surgery. This means that as a result of irritation, the bone breaks loose, and that piece of bone is loose in the knee joint.

That is part of this progressive condition.

Joint irritation means something that is going on in a joint which produces a discomfort which can be a source of pain.

This condition might be responsible for the lack of complete extension which would then give a feeling of insecurity.

Plaintiff's Exhibit 7 is an X-ray of the left knee taken in 1962 and shows the narrowing of the joint space as compared with the right, and there have been some changes in the nature of thickening of the bone as compared with the right knee. When I say the left and the right, I am comparing it with X-ray 9, also taken in 1962.

X-rays 6 and 8 are AP views of the left and right knees respectively.

(Witness follows the outlines of the joint space of the right knee so jurors can see it and then shows it on the left knee.)

The condition of the left knee is consistent with my clinical findings. In my opinion, this condition of the left knee joint is permanent.

In a general way I am familiar with the duties of a switchman. Whether this man was fit to do the work of a railroad switchman would depend upon the rigors and dangers of the particular assignment the railroad required.

If I were to assume the work entailed getting on and off moving railroad cars, walking on the top of railroad cars, riding on the side of cars, walking along the right-of-way, accepting and receiving hand signals, it would be my opinion he would not be able to sustain any prolonged walking or other things mentioned, and I so reported.

Cross Examination by Mr. Schmidt.

With reference to the cases where a medial meniscus was removed, I would hate to estimate that. I did between six and seven hundred operations last year, and I know a considerable percentage of them were these, and in service we had a lot of them. The average time for disability depends upon their occupation, the amount of damage associated with the cartilage, how soon it is taken out, the extent of the tear, and upon the surgeon, and also upon the post-operative surgical care. The attending doctor would know what he found inside.

There are various kinds of treatment. I put my patients on exercise before surgery because before surgery their muscles get weak from limping, and after surgery they do not want to move because it hurts.

The physical examination is more important than the X-ray. I found no instability of the ligaments. The incomplete extension is in itself a matter of manifestation of instability because he has to depend upon his muscles to keep his knees from collapsing.

He had full range of flexion. He had a minimal amount of crepitus in the left knee; none in the right.

The weight of a patient has something to do with the advancement of arthritis. In the right knee, there were only minimal arthritic changes.

51 I measured both knees and found them equal. It was my opinion that this man's knee ought to be re-explored to find out what was blocking his extension.

52 I have on occasion injected such knees which had difficulty in extension, and if this increased, I would consider the probability of an arthrodomy to find out what was between the bones of the joint.

53 These conditions might go on without the presence of pain. It is correct that some people have arthritis and develop it in their knees in later years.

Assuming that the man I saw had the opportunity to do the work of a locomotive fireman, which means getting up into the cab and down once or twice a day and sitting on a seat the rest of the day, I believe he could have

54 carried on that occupation; and, assuming that there was work available as a tower man, which means sitting or standing looking for trains, I can say that I am not familiar with the physical activity on this job, but if it does not require much pull-on or walking or stand-

56 ing, he could do it. The knee joint is supposed to only open like the finger, going forward and backward, and in order to keep it from going side to side, there are ligaments.

57 These ligaments were intact as far as I could ascertain. There was no injury to the nervous system, as related to the knee joint. He had a club foot, a congenital condition.

Redirect Examination by Mr. Dooley.

59-60 By arthrodomy is meant the opening of the joint and subsequent to that you have to perform whatever may be required.

61 This is a wear and tear type of thing, and the more you wear it, the more uncomfortable it is going to be with this condition.

Mr. Mayer and I had no difficulty.

62 It is my impression that he was honest and affable.

With reference to the time element and the removal of the medial meniscus, it has been my experience that with those who have trick knees, each time they dislocate some of the cartilage, they get an effusion into the knee joint. In making diagnoses of persons in my daily treatment, I take into consideration their complaints.

64 I considered only the objective findings on this case.

Recross Examination by Mr. Schmidt.

65 On X-ray 11, I said there was an osteophyte in the knee. It is labeled right.

Transcript Vol. 7A:

J. M. TRAYLOR, called as a witness in behalf of the defendant, testified as follows:

Direct Examination by Mr. Schmidt.

3 My name is J. M. Traylor, and I am the Superintendent for the Illinois Northern Railway Company. I got that position on April 1, 1959.

A. Yes, sir.

4 Q. And 17, 18—and 18, is that a true and correct copy of the Chicago Car Interchange Bureau rules which apply to the Illinois Northern Railway?

A. It is.

Q. Is Rule (a), a small "a" in there, a true and exact copy of the rule which applies to the interchange of cars between trunk lines and the Illinois Northern?

A. It is.

Mr. Schmidt: I would like to offer Rule (a) into evidence.

Mr. Dooley: This is not admissible in a Safety Appliance action.

The Court: I don't see the relevancy of it.

Mr. Dooley: That is what I am objecting to, particularly in a Safety Appliance action.

The Court: Unless you can assure me of the relevancy in this kind of a case, I would have to sustain the objection.

Mr. Schmidt: I will abide by your ruling, Your Honor.

The Court: The objection is sustained.

5 I have examined the records as to what employment positions have been filled on the railroad since December 18, 1959. People were hired into the Car Department. Their chief job was to couple hose, make ground inspections of the brake rigging and the journal boxes on trains arriving and departing in the yard.

6 The railroad has car inspectors. There is one on duty around the clock, seven days a week, in the 33rd Street Yard, and the same situation exists in the 26th Street Yard. (Objection, on the ground that it is not material to the issues in this case, overruled.)

7 Eight men fully employed.

Q. Do you have any extra-board for the Car Department?

A. No, there is no extra-board.

Q. What is the rate of pay in the Car Department?

A. The rate of pay is $2.59 per hour.

Q. And how many men have been hired—

Mr. Dooley: Your Honor, we object to this because there is no showing that this particular man was ever offered a job in the Car Department or anything of that nature.

Mr. Schmidt: I think we will show here, Your Honor, that he could have gotten it by asking.

The Court: The objection is overruled, without any further discussion.

By Mr. Schmidt:

Q. How many men were hired between December 19, 1958 and today?

By the Witness:

A. Six.

Q. Would you tell us when they were hired?

A. One was hired on March 15, 1959; one on May 5, 1959; one on May 11, 1959; one on January 11, 1960; one on July 19, 1960; and one on July 10, 1961.

Q. Do we have any towermen on the Illinois Northern?

A. Yes.

Q. And would you tell us how many?

A. There are three towermen.

Mr. Dooley: Again, may the record show my standing objection.

The Court: The record will show a continuing objection by Mr. Dooley, and until such time as I sustain an objection, which you won't make, but which I consider is pending, the record will show that your objection is being overruled, Mr. Dooley.

Mr. Dooley: All right, thank you, Your Honor.

The Court: There are three towermen. Let us go on from there.

* * * * *

Q. Mr. Traylor, all the people you testified that were hired at the Illinois Northern in the various positions, are they all still working with the company?

A. No.

Q. And those that aren't, do you know the reasons?

A. Well, they wanted to work other places, some were dismissed for infraction of rules.

Q. Any retirements?

A. No retirements.

Q. Do you know Mr. McWilliams, the Claim Adjuster for the Illinois Northern?

A. Yes, sir.

Q. And do you know of his recent physical condition?

(Objection sustained.)

• • • • •

Transcript Vol. 7:

600 Q. Is that three hired since that period of time, or how many do you have altogether?

A. There are regular assigned and one relief man. That makes seven men—four men, and three have been hired since December 18, 1958.

Q. And what is the pay of a tower man?

A. Two forty-three decimal four per hour.

Q. When were these three tower men hired?

A. One was hired on October 26, 1959; one on March 4, 1960; and one on October 9, 1961.

Q. And just briefly, what is a towerman's job on the Illinois Northern?

A. Well, that is—he lets trains through on signal as they approach the crossing.

Q. And does he do his work in one place, or what?

A. Yes, in the tower. That is his—

Q. Approximately, how many clerks do you have on the Illinois Northern?

A. Sixteen, I'd say, regular assigned clerks.

Q. Would you tell us just generally what the work of a clerk is on the Illinois Northern?

A. Well, there are various duties according to
601 their assignment. It is just general railroad clerical work around the freight office, checking yards and posting records in the office.

Q. All right, did you hire any clerks since December 19, 1958?

A. We have hired two.

Q. Tell us—

Mr. Dooley: Is this yard clerks or clerks in the office?

The Court: Well, they are clerks. Are these yard clerks, or do you make any distinction between clerks and yard clerks?

The Witness: Well, they are all on the same—they are at liberty to move from one job to another.

The Court: When you say "clerks," that includes yard clerks and other kinds of clerks?

The Witness: That is right.

The Court: All right. Let us continue.

By the Witness:

A. We hired one yard clerk on November 4, 1960.

By Mr. Schmidt:

Q. Who was that?

602 A. That was Mr. J. R. Mayer.

Q. Is he related to the plaintiff in this case?

A. I understand that he is a nephew of the plaintiff.

And then we hired another clerk on March 21, 1961.

Q. What is the range of pay for clerks on the Illinois Northern?

A. That range runs from eighteen twenty to nineteen seventy per day.

Q. Are there any extra boards for clerks or towermen?

A. Well, we don't maintain one. There can be one on men on furlough.

Q. But these that were hired work full time, is that right?

A. They work full time, yes.

Q. Do you have any crossing watchmen on the Illinois Northern?

A. Not at this time. Crossing watchmen were eliminated in October, 1960, but we had hired crossing watchmen since December 18, 1958.

Q. Do we have any firemen working for the Illinois Northern?

603 A. Yes, there is a fireman that matches every engineer working.

Q. Do you have an extra board for firemen?

A. We do.

Q. Approximately how many men do you maintain on the extra board?

A. Well, at this time there are four men on the extra board.

Q. And have you hired any firemen since December 18, 1959?

A. We have hired five.

Q. Tell us when they were hired.

A. One was hired June 13, 1959; one on June 26, 1959; one on August 28, 1959; one on February 7, 1960, and one on July 9, 1960.

Q. What is the rate of pay for firemen?

A. A fireman's rate of pay is $22.16 per day.

Q. Do you have any idea, based on the business of the Illinois Northern since you have been there, Mr. Traylor, of the approximate number of days or hours that extra board firemen worked?

Mr. Dooley: That is objected to because it varies with each man, your Honor.

604 By the Witness:

A. I don't have any—

The Court: I would think so, and the objection is sustained.

Mr. Schmidt: I will withdraw the question, your Honor.

By Mr. Schmidt:

Q. Now, is there any prohibition or rule against Mr. Mayer coming in and getting one of the jobs that you have mentioned?

A. No, we give any employee the privilege of transferring from one department to another.

Q. Has it happened on the Illinois Northern?

A. Oh, it happens frequently. On this list that you are looking at there is a transfer on there of one man.

Q. So there is no rule or company policy against transferring, is there?

A. Oh, the company is very much in favor of it to keep all employees occupied

Q. What happens to a man's seniority when he transfers from one department to another?

A. He loses his seniority in the department or craft 605 he is in and starts his seniority in the next craft.

Q. What are service rights?

A. Well, he retains his service rights, which have effect on his vacation and his pass rights and other privileges that go with long service. He retains those.

The Court: Does he retain his pension rights?

The Witness: Oh, yes, he retains his pension rights. All rights, service rights, are kept intact by transfers from one department to another. He doesn't have to resign from one department to go into another department.

By Mr. Schmidt:

Q. Has Mr. Mayer once, since December 19, 1958, contacted you or anybody under you, that is responsible for hiring and asked for any of these jobs?

A. He has not contacted me or it hasn't been reported to me that he wanted to—

Mr. Dooley: I move to strike the answer, your Honor. He can only speak for himself, I assume.

606 The Court: The objection is overruled. It may stand.

Cross-Examination by Mr. Dooley.

615 At no time from the date of the occurrence did the Illinois Northern offer Mayer the job of car inspector.

616 At no time subsequent to the occurrence did the railroad offer him the job of tower man, crossing switchman or fireman. The car inspector's job is one for which one must serve an apprenticeship and ascertain and know the safety appliances, of which there are many.

617 Car inspectors are qualified according to the Interstate Commerce Commission regulations. A tower man operates signals which control the movements of trains.

618 Any man qualified as a tower man since Dec. 18, 1958, has been qualified in that particular field after an apprenticeship. He is directed by the dispatcher.

619 Three tower men were hired since December 18, 1958. Burkhold was born in 1899, and started with the railroad in 1951 as a crossing flagman and was transferred to a tower man's position in October 1959, after he gave up his rights and came over from a crossing flagman's job.

McConnell was born in 1938, and entered the service

620 in January 1960, requested that he be transferred to a vacancy in the tower.

Bagaldon was born in 1911, commenced work as a section laborer in 1959, and was transferred to a tower man in September 1961, at 49 years of age, and there are all the towermen.

621 To get the job of tower man, he doesn't have to pass a physical examination if he has already done so. If a man has an accident on the job, before he comes back to work he goes to the company doctor.

622 With reference to the tower man Charles Schumacher, born in 1931, he entered the service in March 1959, and transferred to the car department in May 1959, at age 38.

Floyd Schumacher, born in 1920, entered the service as a tower man in May 1959, and became employed as a car man in June 1961.

These are names of people who have transferred.

623 Edward Casper entered the service as a tower man on May 11, 1959, and became employed as a car repairman's helper in March 1960, and he is still working. He was 25 when hired.

624 Larry Sceerey was born in 1930. F. P. Kujawa was born in 1911, and entered the service as a car repair helper in 1960 and is still working. The difference between apprentices' and helpers' wages is 24 cents an hour.

628 If the flooring is out on a car, it does not have to be repaired before it can be put in service, since it is a penalty defect. With a drawbar it is different. It has to be repaired. So also does a broken draft gear have to be repaired before it can be put in use.

629 It is necessary to go underneath and release the bolts and pull it out. It is true we cannot move a car.

with a penalty defect. When side ladders are off, we have to weld them on and use torches and things of that nature on the rip track.

630 Ray Nassenstein, born 1936, entered service in November, 1958, and transferred to the car department in 1961. He relinquished his rights on the fireman's board and took rights on the car man's board. He was an extra man on the fireman's board.

631 When a man is on the extra board, the only rights he has acquired is to be higher on the board so that he can get on the roster. The next one would be clerks. The first is J. R. Mayer, born in 1933, entered the service in 632 the first yard clerk position in November 1960, and is still working. He is 27 years of age. He had four years of high school. The next yard clerk is T. P. Anderson, 633 hired a year ago, born in 1943. He was 18 when made a yard clerk. He started out as a janitor in 1960, when he was still in school. He had four years of high school. We have no more crossing watchmen, since they are furloughed.

634 The only place we have had a watchman would be at a crossing where there was much rail and automo- 635 tive traffic. We don't have men on the crossing except 636 when the gates fail. There are four firemen on the extra board. We have firemen on the extra board who have as much as seven years service. Firemen and engine men belong to a different craft, as do every one of these who I have referred to.

637 Q. Mr. Traylor, has your company at any time during the past seven years put a switchman who has been injured on the job in the job of either fireman, towerman, car inspector or crossing man?

Mr. Schmidt: I object to this as being immaterial, your Honor. This case goes on this man and his condition.

The Court: The objection is sustained.

638 Q. Well, in any injury to a switchman, whenever you dispose of his case with him, you require a resignation from him, do you not?

Mr. Schmidt: Objection, your Honor. This is not proper.

Mr. Dooley: It certainly is. It goes right to their policy.

The Court: The objection is sustained.

By Mr. Dooley:

Q. Isn't it the policy of your company, insofar as trainmen are concerned, when they are once injured in any

639 way which may cause a re-injury, not to take them back if at all possible?

Mr. Schmidt: Objection, your Honor.

The Court: The objection is sustained, because that is not this case.

Q. Well, at any time, to your knowledge, have you put any trainmen who have been hurt on the job in any one of these jobs?

Mr. Schmidt: Objection, your Honor, this is the same question that was asked before and the objection sustained.

Mr. Dooley: I would like to be heard on this, your Honor.

640 The Court: Of course, he hasn't finished the question or have you?

Mr. Dooley: Yes, I have.

I would like to be heard on it, if they are contending that this man could have had one of these jobs.

The Court: I mean, all you have got to do is produce some evidence that he couldn't have.

Mr. Dooley: Judge, that is what I am trying to do.

The Court: If you qualify your question to correspond to this plaintiff's condition, I will let you ask the question.

Mr. Dooley: All right.

By Mr. Dooley:

Q. Mr. Traylor, during the past ten years, have you, at any time, placed in the job of fireman, car inspector, car inspector's helper, carmen, crossing men, a railroad—

The Court: Towerman.

By Mr. Dooley:

Q. (Continuing)—crossing watchman and towerman, a railroad trainman or switchman who had sus-
641 tained an injury to the left knee-joint requiring surgery and hospitalization of that joint?

Mr. Schmidt: Objection, your Honor. First of all, this man was not with the Illinois Northern for ten years, he has been there since 1959, and he testified to that, and Mr. Dooley is assuming that there was such a switchman and there is no testimony that other switchmen have had this type of injury. I think we have had—

The Court: The objection is sustained.

641-643 Illinois Northern to my knowledge in the last two and one half years has never taken an injured train man and put him in any of the jobs I have enumerated.

644 The Illinois Northern will take an injured trainman and put him back on the job he had before he was injured, provided he can pass the physical examination. If he cannot do so, we don't put him back on the job.

645 *Redirect Examination by Mr. Schmidt.*

With reference to a carman's work, there are two men operating one shift on the rip track, and they are occupied about four hours a day. The other carmen couple hoses and make ground inspections.

646 The men on the rip track spend about four hours a day working. I am the superintendent of the railroad and concerned with all its operations.

Transcript Vol. 8:

2 The Clerk: 60 C 162, Mayer vs. Illinois Northern Railway on trial.

The Court: Is the doctor here yet?

Mr. Schmidt: Yes, he is, Your Honor.

Mr. Dooley: Judge, could I be heard on this?

The Court: Yes.

(The following proceedings were had in open court outside the presence and hearing of the jury:)

Mr. Dooley: If Your Honor will recall—

The Court: I recall.

Mr. Dooley: I just want to renew that objection and I want to get to something which the court has not had an opportunity to pass upon.

As the record shows, of course, the defendant made a motion to have the plaintiff subjected to an impartial medical examination and this was accomplished and the medical examination made by Dr. Thomas D. Hall, who I presume and no doubt was selected in the mode provided for by the rules of this court. Now, then, the defendant was not satisfied with that report and obtained an order for

3 a second impartial medical examiner and we objected, of course, on the ground that that would violate the very purpose of the rule and

The Court: I think the record probably shows at the prior hearings that the reason for the second medical was the fact that Dr. Hall's findings were based entirely on subjective symptoms and that at the time an impartial medical was asked for one of the chief bones of conten-

tion was whether it would be necessary in the future to remove the patella, as I recall it.

Mr. Dooley: That is right, that is just what I am getting to.

The Court: And that since that question wasn't touched on in his report, which I understand was called to his attention at the time he reported, and because of the fact that most of his findings were based on subjective symptoms the defendant thought and the court thought that a report from someone whose findings would be based on objective symptoms and who would endeavor, if possible, to resolve what at one time was the main bone of contention as to whether the patella should be removed or not, another doctor should be appointed and that is how it came about.

Mr. Dooley: Yes, and the court's recollection is very clear on this. They took the deposition of Dr. Addison and it was his opinion that there should be a patellectomy. On behalf of the plaintiff here there has been no evidence to that effect.

Dr. Hall has come in and he has testified to his objective findings, and insofar as—as I say, this question of the removal of the patella was not even in the case.

The Court: Well, it is not in the case now but I guess it had to be in the case during the pre-trial discussions or such an appointment and such calling specifically to the attention of the court the patella business wouldn't have been mentioned if at sometime it hadn't arose.

Did it arise at some time, Mr. Schmidt?

Mr. Schmidt: It definitely did, Your Honor, in the pre-trials.

Mr. Dooley: It arose, Your Honor—I have presented to you that Dr. Addison, whose deposition was taken, was of the opinion that there should be the removal of the patella, and the court was considering sending him back

to Dr. Hall at first to determine that question and then finally, and I have the orders here which the defendant drew, "That cause coming on to be heard at a pre-trial set on motion of the defendant for the purpose of raising the following objections to the report of the impartial medical examiner, Thomas D. Hall, M.D.: 1, that the findings and conclusions of said report are based in part on the history and subjective symptoms of the plaintiff, and, 2, that the said report fails to comment on the problem which led to defendant's request for an impartial medical examination, namely, whether there were any medical findings which would warrant the removal of plaintiff's left patella at a future date."

Now, insofar as 1 and 2 are concerned, neither are present here.

The Court: That is right.

Mr. Dooley: And I think, Your Honor, that it would destroy the very purpose of the rule to allow two impartial medical examiners. I have taken—I mean we all have to take the risk which goes with an impartial medical examination. That is a calculated risk which they took. I didn't know what the report was going to be.

The Court: I don't think anybody knew what it was going to be. Nobody knows until you get the report.

Mr. Dooley: I know it, and I am just saying that that happens to us but then to allow a defendant who has made the motion particularly to come in and get another report, another medical examiner—

The Court: Whom the defendant has no control over and neither does the court, other than to ask that the rules be complied with in making his selection.

I fail to see if one of the impartial medical examiner's testimony, if you consider it sufficiently favorable to

put on in your case in chief, how you can be hurt by the defendant if they chose to do so, putting on the other doctor. I would say that it is, in a fashion, sort of a Mexican standoff. You have the benefit of whatever comfort you got out of Hall's testimony and they have the benefit, if they get any comfort out of what the second doctor is going to say.

Mr. Dooley: Of course, that is hardly the purpose of the rule.

The Court: I understand that.

Mr. Dooley: I have been on the other side where the report is adverse. We have never gotten a second impartial medical nor have we endeavored to.

DR. SIDNEY SIDEMAN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Schmidt.

I am a physician and surgeon, specializing in orthopedic surgery. I am acquainted with X-rays. I was appointed through the order of the Court to examine the plaintiff in this case. I first saw the plaintiff on December 6, 1961, at my office. I had the X-rays of Dr. Vachout and Dr. Conley and the hospital record. The objective findings were confined to the lower left extremity. There was a one-half inch shortening in length of the entire left lower extremity, an atrophy of the muscles of the left calf and left thigh. The left foot was in a deformed position. This was a congenital condition, with which the patient was born. There was a one-half inch enlargement of the left knee as compared with the right, with a scar overlying the front

and inner portion of the left knee. The knee presented a normal range of motion. The muscle power that controlled the knee was normal. There was no impairment of the nerve supply to the area of the limb. It was my opinion that the muscles that extended the knee were functioning normal. There was a crepitus in both right and left knee joints.

X-ray examinations were made on December 6, 1961. Defendant's Exhibit 8 was taken with the knee completely flexed. There is a spur which you see which we call arthritis, but that is outside of the joint. Defendant's Exhibit 9 is a lateral view of the knees. From this X-ray one would say the bones were within normal. Defendant's Exhibit 10 shows a slight degree of narrowing, and there are two osteophytes, bones responding to a reaction called arthritis, and this type is what we call traumatic, meaning due to injury. These are outside of the patella.

Hypothetical question asked and objections thereto.

It is my opinion, in response to a hypothetical question that this man has function restored to the pre-December 18, 1958, injury status and can do the same type of work he did before December 18, 1958. My reasons are that the meniscus was torn by the injury, and it was the torn meniscus that lead to surgery, and the convalescence over a period of years has put the knee in such status that when you examine it, the only thing you find different from the other knee is the incision. Up through the X-ray examination of 1961, it was my opinion that there had been a gradual increase in the changes on the inner part of the joint at the tibia showing an advancement of the arthritic changes. I am not familiar with the general duties and functions of a switchman.

Cross Examination by Mr. Dooley.

From the X-ray films, I saw changes in the arthritic process were taking place in the left knee joint. Injury can be a cause of activating arthritic changes. One may have a bad arthritic condition and not even know it until the doctor takes the X-ray. It does not in and of itself cause pain. The recognized procedure in orthopedics, when examining an extremity, is to compare it with the other and that is how one arrives at the norm. The atrophy which I found in this man's left calf and thigh was in nowise associated with the condition of his foot. Atrophy is a wasting, and it takes time, and I would expect to find wasting in the thigh or calf if the injury involves the knee. There was a half inch enlargement of the left knee when I examined him as compared to the right knee. There was an inch and a quarter difference in the calves, and the left thigh was nineteen and one-quarter inches in circumference, and the right thigh was twenty and three-quarter inches. The right leg above the knee was larger than the left leg. The right leg below the knee was larger than the left leg, and at the knee joint, the left knee was larger than the right knee joint. The patella moves as the leg is extended or bent, moving up and down, and it rides up and down, at the end of the big thigh bone. The knee joint is the largest joint in the body and one of the most complex joints in the body. This is because it takes excessive weight changes and the leverage of various forces. It will take your whole weight whether you are squatting or standing. It is composed of ligaments that cross right within the joint. It has cartilage in the joints and has an ability to bend and straighten and likewise to rotate on itself.

Directing my attention to some X-rays that I have seen, one marked Defendant's Exhibit 3 taken January 26, 1959, which is the left leg of Mr. Mayer, it shows, with reference to the space between the femur and the tibia an area completely clear of any arthritic deposit in a person 52 years of age, and I would classify that as a normal knee joint. The spurs I talked about take time to form. If a person is injured and osteoarthritic processes become activated, those would not show on a film taken shortly after an injury. Directing my attention to Plaintiff's Exhibits 6 and 8, I find that the X-ray of the right knee has less arthritic deposit than the left, and with reference to the film taken in January, 1959, the condyles of the left knee are smooth and don't show the spurs. This indicates that between January 1959, and March 23, 1962, there has been an active process which has accounted for the spurs. The best way to determine the amount of spurring is through the X-ray. When an injury causes a tearing of the medial meniscus, from that time forward there commences a degenerative process. Following an injury to the knee and an operation several months later one would expect to find some focal degeneration. That is because it has been going on all the time that the knee has been used, from the time of the injury until the time of the surgery. It is important to repair the medial meniscus as soon as possible, for two reasons—one to give the joint its normal stability and the second to prevent a progressive degenerative arthritis.

I never saw this man before I examined him. When I was asked the hypothetical question, I had not yet seen the 1962 X-rays. In my day in and day out experience, I take into consideration in arriving at a diagnosis the sub-

jective symptoms of the patient. It is the first question I ask him when he comes to my office. I said I did not
93 have any particular knowledge of a switchman's duties. In extremes of activity, it is possible to affect this type of knee joint. Most people have trouble with stairs. I do not think climbing up and down the side ladder of a railroad car would subject it to any strain, or getting on and off a moving car. It is true that this condition
94 can cause pain. When there is pain in a joint, it interferes with our ability to use that joint, since painful joints are hard to use. The man cooperated when I examined him.

Redirect Examination by Mr. Schmidt.

The injury to the joint prepares the way for the development of arthritis. If, over a given period, a person does not use his leg, you would expect some atrophy. If one did not use his bad leg for a period of time but kept using his normal side all the time and did not use the other side, then there would be a measurable difference. There
96 was no locking of Mr. Mayer's knee joint. My X-rays were taken December, 1961, which is three months before the X-rays taken in March, 1962, and there was arthritic process in the medial side of the left knee. I found no effusion on my examination.

Recross Examination by Mr. Dooley.

97 It was my opinion that the condition of atrophy on the left side was associated with the condition of the
98 foot. With the calf being smaller on the left side, the thigh being smaller on the left than the right, I would naturally expect the knee joint to be somewhat smaller on the left side too, but in this case I found it one-half inch in circumference larger.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1963

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 29th, 1964.

/s/ Tom C. Clark
Associate Justice of the Supreme Court of the United States.

February 7, 1964.

In The
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Wednesday, November 13, 1963

Before

Hon. John S. Hastings, Chief Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Latham Castle, Circuit Judge

It Is Ordered by the Court that plaintiff-appellant's petition for a rehearing of this cause be, and the same is hereby Denied.

APPENDIX II

No. 14060 September Term, 1963—September Session, 1963

Norman Mayer,
Plaintiff-Appellant,

vs.

Illinois Northern Railway,
a corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

October 10, 1963

Before HASTINGS, *Chief Judge*, SCHNACKENBERG and CASTLE, *Circuit Judges*.

CASTLE, *Circuit Judge*. Plaintiff-appellant brought this action under the Federal Safety Appliance Act against his employer, Illinois Northern Railway, to recover for personal injuries suffered while plaintiff was working in his capacity as switchman.

The case was tried before a jury which returned a verdict of $10,000 for plaintiff upon which the court entered judgment. Plaintiff appeals from such judgment.

The record discloses that special damages sustained by the plaintiff amounted to about $750.00 total for medical expenses. Plaintiff's claim for additional damages is predicated upon his contention that loss of wages amounted to $11,188.20, and is based on pain and suffering, use of crutches for four months and permanency and extent of arthritic processes activated by the trauma to the knee and the effect of the injury on plaintiff's general condition of well being.

The basic issue presented by plaintiff's appeal is whether the trial court abused its discretion, as a matter of law, in overruling the plaintiff's motion for a new trial. Absent prejudicial error adversely affecting the substantial rights of the plaintiff—inconsistent with substantial justice—the ruling of the District Court must stand. Rule 61, Fed. Rules of Civil Procedure (28 U. S. C. A).

The main errors complained of by the plaintiff are:

(1) That the verdict of the jury was inadequate and ignored or overlooked elements of damages fully proved.

(2) The trial court erred in ordering a second impartial medical examination.

In determining whether a verdict is inadequate plaintiff's damages should be computed upon the basis most favorable to the defendant. *Fairmount Glass Works* v. *Coal Co.*, 287 U.S. at 480; *Flener* v. *Louisville & N. R. Co.*, 198 F. 2d at 80.

Viewing the plaintiff's damages in a light favorable to the defendant, but still giving plaintiff the benefit of several doubts, the following damages were proven at trial:

Hospital bill	$399.56
Doctor's bill	350.00
Initial period of time loss— 13 weeks at $20.99 per day	1,364.35
Second period of time loss— 30 weeks at $21.23 per day	3,184.50
	$5,298.41

The second period of time loss is based on the testimony of plaintiff's own physician, who testified that he felt plaintiff was ready to return to work in February or March of 1960, approximately 30 weeks after the operation. From the testimony of the examining doctors who evaluated plaintiff's condition the jury was warranted in finding that after that time plaintiff could do his regular work, work as a locomotive fireman or a towerman, or do many types of ordinary work.

In this case there is a conflict in the evidence on the nature and extent of plaintiff's alleged injuries and damages. On the record before us this court cannot say as a matter of law or fact that the jurors were activated by passion, prejudice or corrupt motive, or that they committed a gross error or that the trial court committed a clear or manifest abuse of sound judicial discretion in denying plaintiff's motion for a new trial.

Rule 20 of the Civil Rules of the United States District Court for the Northern District of Illinois provides (a) for "an examination" (physical, medical, psychiatric, either or all) by an impartial medical expert or experts.[1]

---

(1) "Rule 20. Impartial Medical Testimony.

(a) Prior to the date set for the commencement of the trial of any personal injury suit, an examination (physical, medical, psychiatric, either or all) of the injured person, together with a report thereon, by an impartial medical expert or experts may be ordered—

(1) By a judge on his own motion, or

(2) On the motion of counsel for either party after a hearing thereon, if a hearing is requested, if, in the judgment of the court such an order will be in the interest of justice and will materially aid in the just determination of the cause. The granting or withholding

Under its provisions Dr. Thomas D. Hall was designated as the first impartial medical examiner.

During the course of the pretrials, plaintiff let it be known that it was the opinion of Dr. Robert G. Addison, an orthopedic surgeon, to whom plaintiff had been referred by his counsel, that he should have his left patella removed. This was defendant's first notice of this claim. The first impartial medical examination was sought by defendant primarily for the purpose of determining necessity for such removal.

---

of such an order shall be entirely discretionary with the court. A copy of the report of examination shall be given to the court and to the attorneys for the respective parties.

Should the judge, at any time during the trial of the cause, consider it advisable, he may, in his discretion, and on his own motion, order such an examination and report.

Any examination ordered shall be made by a member or members of a panel of examining physicians designated for his or their particular qualifications by the Illinois State Medical Society after consultation with the court.

(b) At the termination of the case in this court, the trial judge shall fix the compensation of the expert or experts and, unless otherwise directed by the court, such compensation shall be taxed as costs and paid by order of court. The judge, in his discretion, may direct that the parties, or either of them, deposit with the Clerk of the Court security in a specified amount which may be used for the payment of such compensation.

(c) In the event that the case shall go to trial after such examination and report have been made, or that trial shall be resumed, then either party or the court may call the examining physician or physicians to testify, in which event additional compensation may be allowed and taxed as costs as aforesaid."

Dr. Hall's report was devoid of any mention of the future fate of plaintiff's left patella; it left the conflict for which the case was referred to him unresolved. In addition, the doctor's findings were so predicated upon the history given by plaintiff and his subjective complaints that the parties were not apprised of what the doctor's opinion would be in court where he would be limited to testifying to objective findings.

The defendant pursuant to Rule 20 again petitioned the court for the appointment of another impartial medical examiner. The court granted such motion and re-referred the case to the Illinois State Medical Society, pursuant to Rule 20(a) (2). Dr. Sidney Sideman was then designated by the Society to conduct the second examination. Counsel for the plaintiff strenuously objected to the appointment of a second impartial medical examiner. Both testified at the trial as did other medical witnesses called by the parties.

We are of the opinion that the court pretty well summed up his reason for ordering a second impartial medical examination by the following remarks between plaintiff's counsel, Mr. Dooley, and the court:

> "Mr. Dooley: • • • Of course, they had nothing to lose by coming in here and getting a second report, and if that is true then any time you get an adverse report you could come in and ask for a second report."
>
> "The Court: Not in my court you can't, and if the situation hadn't been presented to me that this report, as written, indicated it was largely based on history and subjective symptoms, and if it hadn't been indicated to me that the necessity for an impartial medical in the first place was a question of the removal of

the patella, they wouldn't have got a second examination before me. Nobody is coming in to my court and get another impartial medical examination because they do not like the findings in the first one."

We are of the opinion that Rule 20 of the Civil Rules of the United States District Court for the Northern District of Illinois under the facts in this case gave the court authority to require a second impartial medical examination, and that by so doing he did not abuse his discretion.

We have considered other contentions made by the plaintiff, but in the light of a careful examination of the record, and its appraisal under pertinent legal principles, we conclude that no legal error intervened which either prejudicially affected a substantial right of the plaintiff or deprived him of a fair trial.

The judgment order of the District Court is affirmed.

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

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MAR 27 1964
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IN THE,

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 879

NORMAN MAYER,

Petitioner,

vs.

ILLINOIS NORTHERN RAILWAY, A CORPORATION,

Respondent.

BRIEF IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 879.

NORMAN MAYER,

Petitioner,

vs.

ILLINOIS NORTHERN RAILWAY, A CORPORATION,

Respondent.

BRIEF IN OPPOSITION.

QUESTIONS PRESENTED.

1. Should the Court employ the writ of certiorari to review the adequacy of a $10,000 jury verdict, entered in favor of respondent's employee, where an evidentiary basis exists for assessing his damages at approximately $5,000, and a District Court and Court of Appeals have found the trial to be free from prejudicial error?

2. Should the writ of certiorari be employed to review the correctness of a District Court's rulings on the admission and exclusion of evidence applicable to a unique set of facts, where the record clearly shows and a Court of Appeals found said rulings to be free from prejudicial error and consistent with substantial justice?

3. Can a finding that petitioner received a fair trial, free from prejudicial error, made by the Court of Appeals,

upon application of Rule 61 of the Federal Rules of Civil Procedure to the record, be elevated to the status of "a decision in conflict with the decision of another court of appeals on the same matter", where that court and another Court of Appeals correctly applied Rule 61 but reached a different conclusion in unrelated, factually unique cases?

STATEMENT OF THE CASE.

On December 18, 1958, the day of the alleged accident and injury to petitioner's left knee, petitioner was employed as a yard helper, working a regular eight-hour day (T1-127) and earning $20.99 per day.

On January 20, 1959, the first treating physician, Dr. Vachout, stated that petitioner could probably return to his regular employment in ten days to two weeks (Pet's. Ex. 4, T4-340-342).

On the advice of his personal physician, Dr. Miller, petitioner returned to work on April 28 or 29, 1959. There was no evidence that he was examined by a physican of respondent's choosing or that he needed a "back-to-work slip" before returning to work. He did his regular work until August 28, 1959, at which time he again laid off (T1-149) and Dr. Miller performed surgery on petitioner's knee (T2-264.)

While petitioner was undergoing postoperative care by Dr. Miller, the doctor noted the following about the condition of his left leg and knee:

> September 26, 1959—No swelling or effusion; stopped physiotherapy.
>
> October 2, 1959—Condition excellent.
>
> October 9, 1959—Condition improving; quadriceps muscles strong.
>
> October 16, 1959—No swelling, no pain; quadriceps muscles strong.

October 20, 1959—Knee excellent.

November 13, 1959—Slight swelling; condition excellent.

December 19, 1959—No pain or complaint of pain and no swelling or effusion.

January 18, 1960—No swelling; quadriceps muscles strong.

March 21, 1960—No swelling; slight pain (T2-290-293.)

The operation performed on Petitioner—removal of a cartilage from the left knee—is a common one, normally resulting in a three- or four-month time loss from work, according to petitioner's own physician (T2-297-299).

In February of 1960, Dr. Miller felt that petitioner was able to return to his regular work and so advised him (T2-288-289). At the time of trial, Dr. Miller felt that petitioner was capable of doing normal or ordinary work as early as the first part of 1960 (T2-307).

The only medical expenses incurred by petitioner, for which he became personally liable, amounted to about $750. (T2-285, 345). These resulted from his decision to be treated by a physician of his own choosing, Dr. Miller.

Petitioner last sought or received medical treatment in March of 1960, two years before the trial (T1-153-163). Although he claims he did not seek treatment because he was unable to pay for it (T1-153), petitioner was entitled to be treated by Dr. Vachout, an independent practitioner designated by respondent, free of charge (T1-184, T2-329).

The late Dr. Arthur A. Conley, an orthopedic surgeon, with considerable experience in treating railroad employees, examined petitioner postoperatively, for the first time, on December 27, 1960 (T4-10, 75). On that date, Dr. Conley observed that petitioner did not limp; that his left leg muscles had returned to normal development and normal

power; that his left knee had a full and complete range of motion; that there was no swelling, abnormal motion or instability in that knee; and that a preexisting arthritis in that knee did not affect the weight-bearing parts of the joint (T4-21-26). Dr. Conley observed that petitioner was then fit to return to his regular work or that of a railroad fireman (T4-29-30, 40).

Dr. Thomas D. Hall, an impartial medical examiner, examined petitioner, on June 2, 1961. He was of the opinion that petitioner could have carried on the job of a locomotive fireman or a towerman, or many other types of ordinary work (T5-53-55). The longest period of disability following a cartilage removal to which the doctor testified was three or four months (T5-45). He also testified as follows:

> "Q. Anyone you know advise keeping him at rest for three years?
>
> "A. No, I never heard of anything like that." (T5-52.)

Dr. Sidney Sideman, another impartial medical expert, found petitioner had normal extension and flexion, muscle power and control, and stability in his left leg and knee (T8-30-31). He found that petitioner could return to his regular work (T8-72).

Although petitioner had worked as a yardman and switch tender for the last several years, he had previous railroad experience as a yard clerk, caller in a freight house, and inspector in the refrigerator department, and was qualified as a locomotive fireman (T1-186-187, 193).

Between December 18, 1958 and the time of trial, petitioner's regular work was available to him as well as other jobs with the defendant—such as car man, at a rate of $2.59 per hour (T7a-7-8); towerman, at $2.43 per hour (T7-600); clerk, at $18.20 to $19.70 per day (T7-601-602); or locomotive fireman, at $22.16 per day (T7-603).

Up to the time of trial, he had not made an effort to return to his regular work or to obtain other employment with the respondent or anyone else (T1-184-185, 193; T2-244).

ARGUMENT.

I.

THE WRIT OF CERTIORARI SHOULD NOT BE EMPLOYED, IN A FEDERAL EMPLOYERS' LIABILITY ACT CASE, TO REVIEW THE ACTION OF A DISTRICT COURT OR COURT OF APPEALS IN DENYING A MOTION FOR NEW TRIAL BASED ON THE ADEQUACY OF A JURY VERDICT. THIS IS PARTICULARLY TRUE WHERE, AS HERE, THERE IS AN EVIDENTIARY BASIS FOR THE JURY'S VERDICT.

Stripped to its one basic essential, petitioner's argument for granting the writ can be summed up in the words: "*The jury did not award me as much in the way of money damages as I believe I was entitled to.*" Although this lament is being heard with less frequency in this day of the "adequate award", it is not novel or unique.

Despite this Court's admonition that the petition should completely disclose the real nature of the controversy, when applying for certiorari, (*Southern Power Co.* v. *Pub. Serv. Co.*, 263 U. S. 508, 509 [1923]; *Furness, Withy & Co.* v. *Yang-Tsze Ins. Ass'n.*, 242 U. S. 430, 433 [1916]) petitioner has shied away from the nub of his case and set up the straw-man of "conflicting decisions of courts of appeal in applying Rule 61 of the Federal Rules of Civil Procedure." This matter will be covered in Part III of our brief.

"The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that damages awarded by the jury were excessive or were inadequate." *Fairmount Glass Works* v. *Coal Co.*, 287 U. S. 474, 481 (1933).

In *Fairmount Glass Works* the jury awarded plaintiff nominal damages of one dollar, in an action on a contract where it had proven damages in excess of $18,000. The trial court refused to grant a new trial. The Court of Appeals reversed the trial court and ordered a new trial. 59 F. 2d 539 (7th Cir. 1932). In answering plaintiff's argument that his motion for new trial presented an issue of law, subject to review on appeal, this Court held:

> "The record before us does not contain any explanation by the trial court of the refusal to grant a new trial, or any interpretation by it of the jury's verdict. In the absence of such expressions by the trial court in the case at bar, the refusal to grant a new trial cannot be held erroneous as a matter of law. Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct." 287 U. S., at 485.

In meeting the argument that refusal to grant a new trial was an abuse of the trial court's discretion, and hence reviewable, the Court said:

> "The Court of Appeals has not declared that the trial judge abused his discretion. Clearly the mere refusal to grant a new trial where nominal damages were awarded is not an abuse of discretion. This Court has frequently refrained from disturbing the trial court's approval of an award of damages which seemed excessive or inadequate, and the circuit courts of appeals have generally followed a similar polity." 287 U. S., at 485.

In three earlier F. E. L. A. cases, this Court has held that the power, and with it the duty and responsibility, of dealing with the adequacy of a jury verdict rested upon the courts below. *Louisville & Nashville R. R. Co. v. Holloway*, 246 U. S. 525, 529 (1918); *St. Louis & Iron Mountain*

Ry. v. *Craft*, 237 U. S. 648, 661 (1915); *Southern Railway Co.* v. *Bennett*, 233 U. S. 80, 87 (1914).

The Court of Appeals for the Seventh Circuit has adhered to the rule that it will not review a judgment for excessiveness of damages and held that, "Where the damages awarded are alleged to be inadequate the same rule must be applied." *Flener* v. *Louisville & N. R. Co.*, 198 F. 2d 77, 80 (7th Cir. 1952). However, as a matter of actual practice, that court has reviewed the adequacy of a verdict for the sole purpose of determining whether "a clear or manifest abuse of sound judicial discretion by the trial court" has been shown. *Flener* v. *Louisville & N. R. Co.*, 198 F. 2d at 80; *Bucher* v. *Krause*, 209 F. 2d 576, 586 (7th Cir. 1953); cert. denied 345 U. S. 997 (1954); *Thomas* v. *S. H. Pawley Lumber Company*, 303 F. 2d 604, 608-609 (7th Cir. 1962).

In the case at bar, the Seventh Circuit Court of Appeals examined the record and said:

> "In this case there is a conflict in the evidence on the nature and extent of plaintiff's alleged injuries and damages. On the record before us this court cannot say as a matter of law or fact that the jurors were activated by passion, prejudice or corrupt motive, or that they committed a gross error or that the trial court committed a clear or manifest abuse of sound judicial discretion in denying plaintiff's motion for a new trial." 324 F. 2d 154, at 155.

Even if this Court were prone to examine the record on damages in this case, it is obvious that there is an evidentiary basis for the verdict.

In determining whether a verdict is inadequate, petitioner's damages should be computed upon the basis most favorable to respondent. *Fairmount Glass Works* v. *Coal Co.*, 287 U. S. at 480; *Flener* v. *Louisville & N. R. Co.*, 198 F. 2d at 80. Petitioner does not quarrel with this rule.

Viewing petitioner's damages in a light favorable to respondent, but still giving petitioner the benefit of several doubts, the following damages were proven at trial:

Hospital bill (T2-345)	$ 399.56
Dr. Miller's bill (T2-285)	350.00
Initial period of time loss— (T1-149, T2-342)	1,364.35
Second period of time loss (T2-342)	3,184.50
	$5,298.41

The second period of time loss is based on the testimony of petitioner's own physician, who testified that he felt petitioner was ready to return to work in February or March of 1960, approximately 30 weeks after the operation. (T2-288-289, 307). All of the examining doctors who evaluated petitioner's condition felt he could do his regular work (T4-29-30; T8-72), work as a locomotive fireman or a towerman, or do many types of ordinary work. (T4, 40; T5-53-55.)

In petitioner's brief supporting his motion for a new trial, he conceded to the trial court that hospital and doctor bills and lost wages "to the earliest date he could possibly return to work" amounted to $7,750.00 (R. 243). In the court of appeals, he argued that lost wages alone amounted to $11,188.20. Now he suggests that this element of damages could reach $20,208.20 (Pet. p. 20). In so doing, he is certainly not viewing the evidence in a light favorable to respondent.

As the court said in *Klegsteuber* v. *Pittsburgh, Chartiers & Y. Ry. Co.*, 118 F. Supp. 390 (W. D. Pa. 1954), in ruling on the plaintiff's charge that the verdict was inadequate:

> "The jury had a right to believe the testimony of defendant's doctors to the effect that plaintiff could resume his duties as brakeman." 118 F. Supp. at 392.

In *Larsen* v. *Chicago & N. W. R. Co.*, 171 F. 2d 841, 845 (7th Cir. 1948) it was said:

> "Moreover, it is now well settled that the fixing of the amount of damages in an action for personal injuries is peculiarly within the province of the jury, there being no regular standard by which to measure."

II.

THE WRIT OF CERTIORARI SHOULD NOT BE EMPLOYED TO REVIEW RULINGS ON EVIDENCE AND TO DISCUSS SPECIFIC FACTS. THE TRIAL COURT AND COURT OF APPEALS AGREED THAT THE RECORD IS FREE FROM ERROR AFFECTING PETITIONER'S SUBSTANTIAL RIGHTS.

This Court has long held that it will not grant certiorari to review evidence and discuss specific facts. *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178 (1938); *United States* v. *Johnston*, 268 U. S. 220, 227 (1925); *Houston Oil Co. of Texas* v. *Goodrich*, 245 U. S. 440, 441 (1918). Application of this rule to the case at bar is warranted. Here, we are not dealing with the question of whether a case was properly taken from a jury but with the question of the adequacy of its award. The evidence rulings complained of were reviewed by the trial court and the Court of Appeals. The Court of Appeals found:

> ". . . that no legal error intervened which either prejudicially affected a substantial right of the plaintiff or deprived him of a fair trial." 324 F. 2d at 156.

Petitioner's contention that Rule 61 does not apply to excluded evidence is sheer folly. This can be demonstrated by merely quoting the first sentence of Rule 61:

> "No error in either the admission *or the exclusion* of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial

> or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice." (Emphasis ours.)

This rule is intended to be applied in both the district courts and the courts of appeal. *Gillis* v. *Keystone Mut. Casualty Co.*, 172 F. 2d 826, 830 (6th Cir. 1949).

In *McCandless* v. *United States*, 298 U. S. 342 (1935), cited by petitioner, this Court applied the test now incorporated in Rule 61, when it said:

> "This, as the language plainly shows, does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial." (Italics theirs.) 298 U. S. at 347-348.

A brief look at the rulings petitioner complains of is sufficient to attest to the fact that they were not prejudicially erroneous.

A. Witness Traylor's Testimony Was Not Prejudicial; It Merely Answered That of Petitioner and His Witnesses.

Petitioner, in redirect examination, testified that subsequent to his injury he asked the Respondent's Claim Agent, McWilliams "if there was not something else [he] could do around the railroad" aside from switchman's work. He said that McWilliams told him "no", that "the company doesn't do that any more". (T2-236.) Petitioner further said that when he asked McWilliams for work he did not specify any particular type of work around the railroad (T2-239). The alleged conversation with McWilliams was corroborated by petitioner's wife, who set the time as the "early part of 1959"; she said her husband asked "if

there wasn't some other kind of work that he could do." (T7-728.)

In an effort to show that it would have been futile for him to have gotten another job with the respondent anyway, petitioner testified that if he took a job as a fireman or a yard clerk he would start on the bottom of the seniority list in either craft. He also indicated that he would not be working steadily because he would be on the extra board in either craft (T2-237-238). Petitioner's witness, O'Connor, general chairman and local chairman of the Brotherhood of Railroad Trainmen, also testified that there is an extra board of firemen who were not working regularly and that the same is true in any field of work insofar as operation work is concerned with the railroad (T3-376-377). However, petitioner had to admit that all he had to do to get his job back was to "report for work". (T3-382.) He in fact returned to work in April of 1959, more than 30 days after he first laid off without taking a physical examination and without receiving a back-to-work slip from a company-appointed doctor.

All of the doctors who treated or examined petitioner were of the opinion that he was capable of doing his regular work, or work as a locomotive fireman, a towerman or many types of ordinary work (T2-288-289, 307; T4-29-30, 40; T5-45, 52, 53-55; T8-72).

The evidence clearly showed that petitioner was capable of working as a switchman, fireman, yard clerk, towerman or of doing other ordinary work (T1-186-187, 193).

The only thing that remained to be shown was that these jobs were available to petitioner. Indeed, that was the only objection petitioner's counsel made when Dr. Conley was asked whether petitioner was able to do the work of a fireman. Counsel said:

> "Mr. Dooley: That is objected to unless they are able to show that job was open for him and that he could have had it." (T4-40.)

Mr. Traylor's testimony was offered to show that that job and others were open for petitioner and that he could have had them. The testimony was material and relevant, in view of petitioner's qualifications and medical opinion concerning his ability to work. The testimony was relevant for another reason as well—petitioner made it relevant by introducing testimony to the effect that he asked for other work and was refused by an agent of the respondent.

The respondent was not limited in its rebuttal to merely showing that the alleged conversation with McWilliams did not take place. The conversation to which petitioner testified, and the testimony petitioner introduced about the extra boards, tended to prove (1) that petitioner was ready and willing to do work other than switching; (2) that the respondent in fact refused to give him the opportunity to do such work; and (3) that it would have been futile to take such work because he would have been an extra man, not regularly employed. Respondent was entitled to rebut any or all of these inferences.

Petitioner cannot be sincere in arguing that it was error to show that other jobs were available to him in 1959, when it was he who complains that he asked for such work in early 1959 and was refused.

It is clear that a person seeking to recover damages under the F.E.L.A. must do that which a reasonable man would do under the circumstances to limit the amount of the damages. *Chesapeake & Ohio Ry.* v. *Kelly*, 241 U. S. at 489 (1916). Where a person claims he is unemployable in his regular work, he is duty bound to seek other employment which he is capable of doing. *Alexander* v. *Meiji Kaiun K.K.*, 195 F. Supp. 831, 834 (E.D. La. 1961); *St. Louis-San Francisco Ry. Co.* v. *Bridges*, 131 So. 99, 159 Miss. 268 (1930), cert. denied 283 U. S. 848 (1930).

B. Petitioner Was Not Prejudiced by the Court's Rulings Excluding Evidence.

On pages 18-19 of his petition, petitioner argues that it was error to prohibit witness O'Connor from testifying about an alleged custom of the respondent, outlined in petitioner's counsel's "so-called" offer of proof.

The testimony to which an objection was made (T3-362) and sustained (T3-371) had nothing to do with the purported offer of proof. The petitioner never put any part of the so-called offer of proof to any witness in the form of a question. He did not make a proper offer nor did he get a ruling on it.

In the Court of Appeals petitioner did not argue that the trial court's ruling on O'Connor's testimony was error. He merely discussed that testimony under the heading "The Prejudicial Testimony of the Witness Traylor".

Bowman v. *Robinson*, 16 F. 2d 240, 241 (C.C.A. 9, 1926), the only federal case cited by petitioner, holds that it is not error to exclude testimony about, ". . . the policy of the company relative to employing men who have been injured". *Bowman* is applicable to exclude the offered "policy" testimony of witness O'Connor. It is not applicable to witness Traylor's testimony which merely rebutted that of petitioner.

Whether petitioner should have asked for a job was a fact question for the jury in this case. It was his duty to minimize his damages. *Ambrose* v. *Norfolk Dredging Co.*, 284 F. 2d 802, 803 (4th Cir. 1960). All of the other aspects of petitioner's employment status with the respondent are controlled by a contract between the respondent and petitioner's union. Petitioner's counsel had actual knowledge of the contract but he chose not to offer it in evidence (T3-366).

This Court can take judicial notice of the fact that questions concerning the petitioner's existing employment rights are determined by the Railway Labor Act, 45 U.S.C.A. § 152(11) *et seq.*, *Allen* v. *Southern Ry. Co.*, 114 F. Supp. 72, 73 (W.D., N.C. 1953); and that such questions arising under provisions in the collective bargaining agreement are of a specialized technical nature calling for administrative decision by experts in the field, *Penn. R. Co.* v. *Day*, 360 U. S. 548, 553 (1958).

C. Cross-Examination About Petitioner's True Age and His Efforts to Seek Medical Care in a Case of Alleged Continuing Disability Is Material to the Issues and Not Erroneous.

In his complaint petitioner alleged severe and permanent injuries (R. 7). In his opening statement, petitioner's counsel said the evidence would show that petitioner was 52 years old in December of 1958 (T1-150). Petitioner testified that he was born on August 16, 1906 (T1-119) and that he had a birth certificate which he would produce in court to prove it (T1-192). However, he never did produce it.

Petitioner introduced life expentancy data on a man of his claimed age (T2-335) and asked for and received an instruction of the subject (R-197). At the close of the case, petitioner's counsel argued that petitioner was 52 years old in December of 1958 (T9-13). Counsel referred to petitioner's life expectancy in arguing future lost wages and also argued that petitioner would have pain "as long as he lives." (T9-29-30.)

In considering petitioner's evidence and argument, it becomes obvious that his true age is material to the issue of damages. In the case of an alleged permanent injury and permanent disablement from work, as we have be-

fore us, the length of time petitioner's damages would continue is of uppermost importance.

If petitioner was 64 years of age at the time of his accident and testified that he was 44 years old, the enormity of the falsehood is immediately apparent. In this case respondent impeached petitioner with two employment applications, made in his own writing, three years apart, where he stated he was born on August 16, 1902 (T1-190-191). The four-year difference in age would certainly have some effect on future damages. The trial judge recognized this in his ruling on the point, when he said:

> "The Court: This is a special application, in view of the fact of the question of how much more working life he has is involved." (T1-190.)

Petitioner discusses alleged error in questioning him about frequenting "Murphy's Tavern."

It should be pointed out that petitioner did testify that he ceased going to Dr. Miller because he didn't have the money to pay him (T1-153). This testimony was being introduced to explain why petitioner, with an alleged permanent and painful condition, had not seen a doctor for treatment for two years prior to the trial (T1-153, 163).

In this case, where the need for additional medical care was in issue, the respondent was entitled to show that petitioner had access to free medical care and that he had sufficient funds to procure that care elsewhere. His access to free medical care was shown by the evidence (T1-184, T2-329). Respondent's attempt to show that petitioner had funds available for medical care, if he desired it, was stopped by the court because of its mistaken view of the evidence.

When we opened up the subject, preliminary to attempting to show regular expenditures for alcoholic beverages, at a time during which Petitioner claimed he could not afford

medical attention, we were stopped by an objection (T2-230). Petitioner's counsel erroneously informed the court that:

> "Mr. Dooley: He did not say that he could not afford medical."

The court apparently having forgotten the testimony on the point, or not having heard it, replied:

> "The Court: I never heard him say he could not afford it. He said he had not received any, and he said he had not sought any." (T2-231.)

Upon the court sustaining the objection, the subject was not pursued any further.

We were not permitted to answer an issue raised by plaintiff; he could not have been harmed by evidence which should have but did not go into the record.

D. The District Court Has the Power To Appoint Two Impartial Medical Examiners and in Doing So in This Case Properly Exercised Its Judicial Discretion.

It should be noted that petitioner does not complain that the testimony of either impartial medical examiner was erroneous. He merely argues that the District Court did not properly administer the impartial medical program (Pet. p. 24).

One of the questions presented in *Ex Parte Peterson*, 253 U. S. 300 (1919) was whether a federal district court possessed the inherent power to supply itself with an impartial expert's testimony when it deemed such testimony necessary in the interest of justice. This Court answered that question in the affirmative.

There is no doubt that this inherent power of the district court continues intact today and applies to the appointment of impartial medical experts. *Scott* v. *Spanjer Bros., Inc.*, 298 F. 2d 928, 930-931 (2nd Cir. 1962).

The Court of Appeals for the Seventh Circuit has recently recognized the right of a district court to order more than one physical examination of a plaintiff. In *Ishler* v. *Cook*, 299 F. 2d 507 (7th Cir. 1962), it was said that:

> "The Court may order more than one physical examination of a plaintiff in an action based on personal injury to obtain the full truth concerning the matter in controversy." 299 F. 2d, at 511.

Rule 20 of the Civil Rules of the United States District Court for the Northern District of Illinois, under which we moved for the impartial medical examination complained of, does not in any way impinge on the inherent power of the trial judge in this field. The rule expressly recognizes that the trial court may, in its judgment, order one or more impartial medical examinations. The rule merely sets forth some additional procedures whereby the court may more easily arrange for impartial medical experts and whereby the parties themselves may be the moving forces.

Rule 20(a) provides for "an examination (physical, medical, psychiatric, *either or all*) . . . . by an impartial medical expert *or experts* . . ." (emphasis ours).

Rule 20 makes the granting or withholding of an order for an impartial medical examination entirely "discretionary with the court". The order is to be granted "if, in the judgment of the court such an order will be in the interest of justice and will materially aid in the just determination of the cause."

Applying the foregoing principles to this case, it is at once apparent that the trial court did not commit prejudicial error in ordering a second physical examination.

There were at least five pretrials of this case, prior to the appointment of the first impartial medical examiner, Dr. Thomas D. Hall (R. 95, 101, 103, 105, 115). No pre-

trial order was handed down and the proceedings in chambers were not reported. However, both parties and the trial court are in agreement on the essential facts which led to our asking for the first impartial medical examination.

During the course of the pretrials, which commenced on January 10, 1961 (R. 95), Petitioner let it be known that it was the opinion of Dr. Robert G. Addison, an orthopedic surgeon to whom he was referred by his counsel, that he should have his left patella removed (Deposition of Dr. Addison, pp. 5, 61; Def. deposition, Exhibit 8). This was our first notice of this claim and it created a conflict in medical opinion on the subject. The first impartial medical examination was sought by us primarily for the purpose of resolving this conflict. The court recognized this and Petitioner concedes it to be the case (T8-3-5).

Dr. Hall's report was devoid of any mention of the future fate of Petitioner's left patella; it left the conflict for which the case was referred to him completely unresolved. In addition, the doctor's findings were so predicated upon the history given by Petitioner and his subjective complaints that the parties were not apprised of what the doctor's opinion would be in court, where he would be limited to testifying to objective findings (Ptff's. App. 1a-5a).

The only recourse open to us was to once more petition the trial court, pursuant to Rule 20, which we did (R 137-141). After having heard argument on the motion, the trial court entered an order re-referring the case to the Illinois State Medical Society, pursuant to Rule 20(a)(2) (R. 163). Dr. Sidney Sideman was then designated by the Society to conduct the second examination.

As the trial court said, "the record clearly shows that it wasn't because the first medical report was adverse [to

Respondent] that a second medical report was sought" (T8-7). The fact that the trial court exercised a sound judicial discretion in ruling on our motion for a second impartial medical examination is summed up in the trial judge's spontaneous answer to certain remarks of Petitioner's counsel:

> "Mr. Dooley: . . . Of course, they had nothing to lose by coming in here and getting a second report, and if that is true then any time you get an adverse report you could come in and ask for a second report.
>
> "The Court: Not in my court you can't, and if the situation hadn't been presented to me that this report, as written, indicated it was largely based on history and subjective symptoms, and if it hadn't been indicated to me that the necessity for an impartial medical in the first place was a question of the removal of the patella, they wouldn't have got a second examination before me. Nobody is coming in to my court and get another impartial medical examination because they do not like the findings in the first one." (T8-9.)

Both impartial examiners found petitioner able to return to work. Dr. Hall said he could have carried on the job of a locomotive fireman or a towerman, or many other types of ordinary work (T5-53-55). Dr. Sideman said he could return to his regular work (T8-72). The fact that both doctors testified on the point does not constitute prejudicial error.

There may be only a few instances in which one can conceive of the need for a second impartial medical examination. However, the facts certainly dictated the necessity in this case. Plaintiff was not prejudiced by the reexamination.

III.

PETITIONER HAS NOT DEMONSTRATED THAT THE COURT OF APPEALS HAS RENDERED A DECISION IN THIS CASE IN CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS IN THE SAME MATTER.

The third question presented by petitioner is:

> "3. Which of conflicting decisions at Court of Appeals level are to control the application of Rule 61 to evidence admitted or excluded in actions under the Federal Employers' Liability Act?" (Pet. p. 3.)

However, in arguing the point, we find that his real complaint is about "The manner in which Rule 61 was applied here . . ." (Pet. p. 20).

Petitioner cites three cases in Part II of his petition, in support of the thesis that there is a conflict among the circuits in interpreting Rule 61: *Sears* v. *Southern Pacific Co.*, 313 F. 2d 498 (9th Cir. 1963); *Schillie* v. *Atchison, T. & S. F. Ry.*, 222 F. 2d 810 (8th Cir. 1955); and *Rice* v. *Louisville & N. R. Co.*, 309 F. 2d 930 (6th Cir. 1962).

None of those cases involves an interpretation of Rule 61. Indeed, the rule is not mentioned in any of them. However, in deciding each of those cases, the three Courts of Appeals did exactly what the Court of Appeals did in the case at bar; namely, they reviewed the record for prejudicial error. In *Sears* the Court said:

> "The question remains whether the exclusion of this exhibit was prejudicial." 313 F. 2d at 503.

In *Rice* the Court found:

> "The plaintiff was prejudiced thereby in his right to have a fair trial on the real issue involved, and the judgment of the District Court is vacated and the case remanded for a new trial." 309 F. 2d 934.

In *Schillie* it was said:

> "The rule of evidence of the state in which the case was tried must therefore be applied. Since the evidence was not admissible under the Missouri rule its admission in this case was error. Its admission was no doubt prejudicial." 222 F. 2d at 818.

In each case, upon the record before it, the courts found that the conduct complained of was erroneous and prejudicial. On the record before them in the case at bar, the District Court and Court of Appeals found it free of prejudicial error.

The mere fact that Courts of Appeal, upon reviewing unrelated, factually dissimilar cases in the light of Rule 61, are not uniform in arriving at decisions in favor of or against every plaintiff who comes before them, does not create a real conflict between those courts. *Layne & Bowler Corporation* v. *Western Well Works*, 261 U. S. 387 at 393 (1923).

CONCLUSION.

Petitioner has failed to demonstrate that any special and important reason exists for reviewing this case on a writ; nor has he demonstrated that any of the reasons expressly stated in Rule 19 of this Court exist. Petitioner merely wishes to have his case reviewed and a new trial granted because he feels the jury verdict rendered herein was inadequate. His petition should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1963

No. 879

NORMAN MAYER,

Petitioner,

vs.

ILLINOIS NORTHERN RAILWAY,
a corporation,

Respondent.

REPLY BRIEF.

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REPLY BRIEF.

Respondent fails to meet the issue presented by this Petition. That issue is whether remedies created by the Federal Employer's Liability Act can be nullified by Rule 61 of the Federal Rules of Civil Procedure.

Stated differently, can a carrier, in the defense of a case where an employee has been injured through the violation of the Federal Safety Appliance Act, offer prejudicial evidence, have excluded proper evidence, and then successfully defend its conduct by the invocation of this procedural rule? Certainly, if Rule 61 can be so employed, then the substantive rights given by this Federal Statute can be vitally affected.

This is particularly true in a case such as this, where the only issue is the amount of damages. Petitioner had the right to a fair trial on that issue.

This Court has recognized that Rule 61 can, in effect, nullify the meaning of an Act of Congress. In *Bruno* v. *United States*, 308 U.S. 287, a conspiracy case, the Court refused to instruct the jury concerning the failure of a certain defendant to testify pursuant to a Federal Statute, 28 U. S. C. 632. The Court of Appeals held this was not reversible error (*Bruno* v. *United States* (CA 2), 105 F. 2d 921). In considering whether there had been reversible error, the Court considered 28 U. S. C. 391, which is, in substance, Rule 61, and noted, at P. 294:

> "Suffice it to indicate, what every student of the history behind the Act of February 26, 1919, knows, that that Act was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutae of procedure from touching the merits of a verdict. Of a very different order of importance is the right of an accused to insist on a privilege which Congress has given him."

Moreover, our thoughts, as well as those adopted by a number of Circuits, are best expressed in Judge Frank's dissenting opinion in *United States* v. *Liss* (CA 2), 137 F. 2d 992, wherein he said, at P. 1005:

"The Supreme Court recently admonished us that Congress when, in 28 U.S.C.A. §391, it provided that appellate courts shall give judgment 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties', did not intend that, where there have been 'substantial infringements of the right to a fair trial, we can ignore them. I must confess that I do not understand those persons—I do not include my colleagues among them—who, while purporting to worship the jury, applaud when the 'harmless error' doctrine is pushed to such an extreme as it is in the majority opinion here. My colleagues, in stating that there is a 'modern disposition to assume that an error has been harmless,' have failed to note what five circuit courts have observed: there has been a new trend in the Supreme Court concerning that doctrine since at least 1936; the rule is now said to be that, if error is shown, there must be reversal 'unless it affirmatively appears from the whole record that it was not prejudicial.'"

How the application of this rule can defeat the right of trial by jury which this court has sought to insure is also noted by Judge Frank when he said, pp. 1001, 1002:

"As I understand the fundamental principle of the jury system, we appellate judges do not sit as a jury. It surely follows that we ought not to sustain a verdict of guilty after an unfair trial merely because, upon reading the printed record, we believe that, had we been the jury, we would have convicted. Any other rule has the result that the presence of the jury will often become a mere formality; for then, if only the jury finds guilt, *no matter by what unfair tactics it was persuaded to do so,* we judges, in actual fact, decide the case." (Emphasis added.)

That there is a disparity between the Circuits as to the application of this rule is demonstrated by the footnote.[3]

Indeed, there is a disparity between this decision of the Seventh Circuit and other decisions. We refer to *Wetherbee* v. *Elgin, Joliet & Eastern Ry. Co.* (CA 7), 191 F. 2d 302, 310, wherein the Court held that the Court of Appeals would scan the trial more closely for error if it did not think the verdict was in accord with the weight of the evidence.

So also in *Worcester* v. *Pare Torpedo Co.* (CA 7), 127 F. 2d 945, that Court refused to be foreclosed by the rule but reversed on errors of evidence far less grievous than here.

Consider, too, the very recent decision of the Seventh Circuit in *Goldman* v. *Checker Taxi Co.* (CA 7), 325 F. 2d 853, 856, wherein that Circuit examined the errors and refused to adopt defendant's contention that the only issue was whether the trial court had properly exercised its discretion.

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[3] *Naylor* v. *Isthmian S. S. Co.* (CA 2), 187 F. 2d 538, 541; *Beck* v. *Wings Field, Inc.* (CA 3), 122 F. 2d 114, 116; *Farris* v. *Interstate Circuit* (CA 5), 116 F. 2d 409, 412; *Rice* v. *Louisville & Nashville R. Co.* (CA 6), 309 F. 2d 930, 933; *University City, Mo.* v. *Home Fire & Marine Insurance Co.* (CA 8), 114 F. 2d 288, 295; *Fort Dodge Hotel Co.* v. *Bartelt* (CA 8), 119 F. 2d 253, 259; *Schillie* v. *Atchison, T. & S. F. R. Co.* (CA 8), 222 F. 2d 810, 815; *Lynch* v. *Oregon Lumber Co.* (CA 9), 108 F. 2d 283, 285, 286; *Sears* v. *Southern Pacific Co.* (CA 9), 313 F. 2d 498, 503; *Little* v. *United States* (CA 10), 73 F. 2d 861, 866, to mention a few.

In this case, however, the Court has failed to consider or mention many of the errors assigned, errors which went to the substantive rights of the litigants, in that they concerned the remedy.

Traylor's Testimony Not Rebuttal.

Now respondent justifies Traylor's testimony as rebuttal, stating, "The respondent was not limited in its rebuttal to merely showing that the alleged conversation with McWilliams did not take place." (P. 13)

After plaintiff had been cross examined by defendant concerning not having worked or been offered work by the railroad since his operation (App. I. 19a), he stated on redirect he had asked claim agent McWilliams if there was something else he could do, and was told the company did not do that any more (App. I. 22a). McWilliams then took the stand and denied any such conversation (T. 7-702). That, of course, constituted the rebuttal to the conversation.

Nor can this highly prejudicial evidence be justified as tending to prove that respondent refused to give petitioner the opportunity to work or that it would have been futile to take such work because he would have been an extra man not regularly employed (Opposition brief, P. 12).

The fallaciousness of this argument is pointed up by the fact that at no time did respondent offer any of the jobs in question to petitioner (App. I, 46a), and by the further fact that before a man would be put back on the job after an injury he goes to the company doctor, and his ability to pass that doctor's examination is determinative of his right to return (App. I, 47a and 50a).

Of course, it was undisputed that the railroad had never asked the plaintiff to take a physical examination nor had asked him to return to work.

As the case was presented, it is made to appear that petitioner had the exclusive determination of whether he would return to work. The part respondent played was obviated by a foreclosure of proof. After Traylor had testified as to the company rules and practices, we were prohibited from showing that it was the custom and practice of the railroad (App. I, 45a) concerning an injured employee to give him a back-to-work slip when it found that he was able to do so, and that unless he did return to work under these circumstances, to take him off the roster. Thus, the offer of proof was:

> "Mr. Dooley: Your Honor, I desire to show by this witness that it is the custom and practice of the railroad company, when it finds a man is fit to go back after an injury on the job, to give him a return-to-work slip; secondly, I likewise intend and offer to prove by this witness that it is the custom and practice to, if a man has been injured and who does not return to work, to take him off the roster. Now, I say that because the railroad company is contending in this case that this man should have returned to work. The railroad company has never given him a return-to-work slip." (App. I, 32a)

The custom and practice which petitioner sought to prove by this witness was stated so that its significance in the evidence was obvious to the District Judge. That is all that is required under the Federal Rules of Civil Procedure, 43(c). *U. S.* v. *Lowry* (CA 4), 246 F. 2d 472; and *Hoffman* v. *Palmer* (CA 2), 129 F. 2d 976.

Impartial Medical Examiners.

Respondent, conscious of the confusion resulting from the two court-appointed physicians testifying, one on behalf of the petitioner and the other on behalf of respondent, now urges: "* * * petitioner does not complain that the testimony of either impartial medical examiner was erroneous. He merely argues that the District Court did not properly administer the impartial medical program." (Opposition brief, P. 17)

In the District Court, the Court of Appeals, and here, our argument has been that after an examination under this rule, a second examination by another so-called impartial doctor should not be had so that at the trial of the case one party calls one doctor and the other party the other since such conduct cannot but mislead the jury.

This is not that situation where the Court enters an order pursuant to this rule directing that a party be examined by an orthopedist, neurosurgeon, psychiatrist, etc., on the same day or within a few days. Here we have one medical examination, a report filed adverse to respondent, and respondent then allowed to have a second examination by another impartial examiner in the same specialty.

There is no precedent for this bizarre procedure. Respondent has submitted none.

Respondent says the appointment and testimony of this second medical examiner was justified because a doctor who did not testify at the trial was of the opinion that there should be a removal of the patella and that Dr. Hall's report fails to mention this. This could hardly justify the appointment of a second doctor, let alone allowing that second doctor to testify in a case where there

was no contention made that the patella should be removed.

The proper procedure would have been to refer this man back to Dr. Hall for an answer to this question.

But, taking respondent's argument at its face value, how could a second doctor be called when the reasons for his appointment, namely, the opinion of a doctor who gave a deposition, were not alluded to at the trial?

There are other errors which the Court of Appeals refused to review under the guise of Rule 61. They all went to petitioner's damages—a substantive right.

This Court should award the writ to resolve the conflicts between the various Circuits and within this very Circuit as to the scope of Rule 61 of the Federal Rules of Civil Procedure. Otherwise, what is an error on a substantive right will be determined by the attitude of the particular three judges on the panel. What may be prejudicial error to one panel may not be to another. Certainly, this does not make for equal protection of the law and order in the administration of justice.

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